IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF PENNSYLVANIA

ACCU-SPEC ELETRONIC
SERVICES, INC.,
Plaintiff

v. CIVIL ACTION NO. 03-394 ERIE

CENTRAL TRANSPORT
INTERNATIONAL, INC. and
LOGISTICS PLUS, INC.,
Defendants

JURY TRIAL - DAY NO. 3

Proceedings held before the HONORABLE

SEAN J. McLAUGHLIN, U.S. District Judge,

in Judge's Chambers & Courtroom C,

U.S. Courthouse, Erie, Pennsylvania,

on Wednesday, October 19, 2005.

APPEARANCES:

W. PATRICK DELANEY, Esquire, appearing on behalf of the Plaintiff.

JEFFREY D. COHEN, Esquire, appearing on behalf of Defendant Central Transport International, Inc.

W. JOHN KNOX, Esquire, appearing on behalf of Defendant Logistics Plus, Inc.

Ronald J. Bench, RMR - Official Court Reporter

I N D E X

WITNESSES:	DIRECT	CROSS	REDIRECT	RECROSS
FOR CENTRAL TRANSPORT:				
DALE MEABON				
By Mr. Cohen -	3	--	--	--
By Mr. Knox -	--	12	--	--
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- - -				
FOR LOGISTICS PLUS:				
CHRIS FANZINI				
By Mr. Knox -	18	--	75	--
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JAMES BERLIN

By Mr. Knox -	77	--	--	--
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EXHIBITS:	IDENTIFIED	ADMITTED
CT Exhibit 6	32	34
CT Exhibit 13	74	74

- - -

P R O C E E D I N G S

(Whereupon, the proceedings began at 9:00 a.m., on Wednesday, October 19, 2005, in Courtroom C.)

THE COURT: Good morning, members of the jury. All right, are we ready to continue?

MR. COHEN: Yes, your Honor.

THE COURT: Where were we witness wise, by way of refreshing my recollection?

MR. COHEN: I believe Central Transport had called its second witness, Mr. Cackowski, and cross-examination was completed. And Central Transport was about to call its third and final witness.

THE COURT: You can certainly do that.

MR. COHEN: Central Transport calls Dale Meabon.

DALE MEABON, CENTRAL TRANSPORT WITNESS, SWORN

DIRECT EXAMINATION

BY MR. COHEN:

Q. Good morning, Mr. Meabon.

A. Good morning.

Q. If you could please state your full name for the jury?

A. Dale Meabon.

Q. And which company do you work for, Mr. Meabon?

A. Central Transport.

Q. And what is your job title there?

A. Driver.
Q. If you could explain to the jury basically what your job history is, how long have you been working for the company and what you've been doing?
A. I've been working for the company four and a half years, I've been driving a truck 28 years.
Q. And with respect to your driving the truck for 28 years, have you had a citation in 28 years of driving?
A. No, I haven't.
Q. With respect to this shipment, which is the subject of this litigation, which is a crate that was moved that contained an X-ray machine, are you familiar with this case?
A. Yes, I am.
Q. Were you the driver that was the delivery driver for this particular shipment?
A. Yes, I was.
Q. What area do you work in?
A. Right in the Erie area.
Q. And which warehouse during the time of this transportation did you operate out of?
A. West 17th Street, Erie facility.
Q. And on the day that you came to get the shipment to

deliver it, what did you do, what is the procedure when you
come to the warehouse?

A. I got to work, took a look in my trailer, the crate that we're talking about was sitting on the tail of my trailer, filling up the whole back of the trailer, all I could see is the one side of it.
Q. What did you do then?
A. Well, I closed the door on the trailer, went in and picked up my bills or delivery receipts. Talked to the terminal manager for a minute, hooked up and left.
Q. And where did you -- well, I guess this thing was on the end of the trailer, correct?
A. Right, on the very back of the trailer.
Q. Was there other freight behind it?
A. Yes, the trailer was full, it had other freight, too.
Q. Now, where were you taking it?
A. To Accu-Spec in McKean.
Q. How far is Accu-Spec from the Erie terminal?
A. Approximately, 10 miles.

Q. In those 10 miles, was there anything unusual that happened?
A. No, nothing.
Q. Did you hit any big potholes?
A. No.
Q. Did you go around any corners, really sharp corners fast?
A. No, I did not.
Q. Anybody stop short in front of you where you had to jam

on your brakes?
A. No.
Q. So it was I guess an uneventful eight miles?
A. Right.
Q. When you got to the destination, Accu-Spec, what did you do next?
A. A person came out, I told them I had a delivery, I stopped in the middle of the parking lot. The crate was too big to unload at their docks, so we had to do it in the parking lot, opened the door of the trailer.
Q. How long were you there total?

A. Probably an hour, little over an hour.

Q. What were you doing most of the time?

A. Mostly sitting waiting for the moving and rigging company to get there to take the crate off the trailer.

Q. Once the rigging company got there, what did the rigging company do?

A. They unloaded their forklift, put on their fork extensions, drove up behind the trailer, lifted the crate off the trailer and set it down on the ground.

Q. Now, you mentioned a delivery receipt, I'm going to show you an exhibit, it's found at Exhibit 2 in that little notebook you have in front of you, Mr. Meabon, I'm also going to put it up in front of the screen, that will be in front of the jury and also yourself. Okay, is this what's known as a delivery

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receipt?

A. Yes, it is.

Q. And who signed the delivery receipt -- over there where the yellow arrow is?

A. J. Mullen.

Q. Was the person who signed that one of the guys who was at Accu-Spec?
A. Yes, he was.
Q. And what is this signature over here on the right side where the arrow is?
A. That's my signature.
Q. All right. When, if you remember, when did the signature take place, was it after the freight was -- after the door was opened?
A. Yes, the signature was signed after the door was opened, I can't really remember if the crate was on or off the truck yet.
Q. Now, after you had the delivery receipt signed and the freight was off your trailer, what did you do next?
A. Well, I was closing up my trailer, they were removing the side off the crate, I was just curious, so I was standing there while they took the side off the crate.
Q. You stuck around to see when they took the door off?
A. Yes.
Q. What did you see when they took the door off?

A. You could see a machine in the crate, that it rolled to one side of the crate.
Q. Okay. In your experience driving a truck for 28 years, have you had an opportunity to see large pieces of freight crated?
A. I've seen yes, large crates.
Q. And have you had occasion to see the packaging inside those crates?
A. Yes, on a few occasions.
Q. Now, you testified this machine rolled. If you could describe to the jury, based on the internal packaging of that crate, what your opinion is as to whether or not or what caused the damage, the packaging or handling or what is your opinion?
A. I would just say poor packaging.
Q. Was there bracing on the top or in the middle of this machine?
A. No, there wasn't any that I could see.
Q. Do you still deliver freight to Accu-Spec?
A. Yes, I have.
Q. How recently?

A. Either last Friday or just this Monday, I delivered a skid of like a brown wrapping paper to them.
Q. Did the same guy come to the dock or was it different people?
A. Different people.

Q. Mr. Meabon, how long have you known George Horetsky?
A. Approximately, four years.
Q. Have you had substantial interaction with Mr. Horetsky on a regular basis?
A. Occasionally, if he's at the terminal, I see him.
Q. Do you know people in the community that know Mr. Horetsky?
A. Yes, I do.
Q. Does Mr. Horetsky have a reputation in the community for being a truthful person?
A. Yes.
MR. DELANEY: Can we have a side bar, your Honor?
THE COURT: Yes.
(At side bar on the record.)

THE COURT: Go ahead.

MR. DELANEY: I presume from the questioning that's been asked, it's bolstering the reputation and credibility of one of the witnesses, George Horetsky. And my impression is that the rules will not permit reputation evidence to come in.

THE COURT: Hold on a second. Go ahead.

MR. DELANEY: My impression is that reputation evidence will be inadmissible in a civil case with regard to a fact witness who is a corporate employee. I have to tell you I can't cite to the rule, I've don't have it, this is rather a surprise, but that's my impression. Reputation testimony or

evidence concerning reputation is inappropriate in an effort to simply bolster his credibility.

THE COURT: What do you have to say about this?

MR. COHEN: Your Honor, I direct your attention to 608 of the Federal Rules of Evidence, evidence of character.

THE COURT: Hang on just one second.

MR. COHEN: I can read it.

THE COURT: I can read it. All right, Rule 608(a) says "the credibility of a witness may be attacked or supported by evidence in the form of opinion or reputation but subject to these limitations. One. The evidence may refer only to character, truthfulness or untruthfulness. And, two, evidence of truthful character is admissible only after the character of the witness or truthfulness has been attacked by opinion or reputation evidence or otherwise. How is his opinion, how is this witness, Horetsky, how was Horetsky's reputation attacked originally so as to trigger the applicability of the rule?

MR. COHEN: Mr. Horetsky's character for truthfulness has been attacked in the opening statement of counsel for Logistics Plus, when he indicated that Mr. Fanzini will testify in direct contradiction to Mr. Horetsky's testimony. This is a case about the credibility determination of these witnesses. Mr. Fanzini is going to say the direct opposite of Mr. Horetsky. Mr. Fanzini is expected to testify that Mr. Horetsky said move the freight down to Class 50.

Basically, calling him a liar. Mr. Horetsky effectively testified no, I never said that. That is a question of truthfulness which has been called into question by the very nature of the dispute in the case. It's central to one of the defenses in this case. That's why we'd like to have this introduction.

MR. DELANEY: I would say that the issue on credibility of the limiting factor in 608 is that there has to be an attack on the witness's character for truthfulness through opinion testimony. I don't see 608 applying here.

THE COURT: It isn't triggered in this case, as in most cases witnesses have different recollections. It would have been triggered if he put someone on the stand who testified to his bad reputation for truthfulness. The objection is sustained.

(End of discussion at side bar.)

THE COURT: Members of the jury, there was a question and answer just before we went over there at side bar, I think the answer was yes, if I remember, disregard the answer. Go ahead.

BY MR. COHEN:

Q. Have you ever received any complaints about Mr. Horetsky doing your work?

A. No, I have not.

MR. COHEN: Mr. Meabon, thank you very much for your

time, I have no further questions.

CROSS-EXAMINATION

BY MR. KNOX:

Q. Mr. Meabon, good morning.

A. Good morning.

Q. I'm going to be very brief. Was this freight coming from California, Mr. Meabon?

A. Yes, it was.

Q. And when you had contact with this freight, this was more or less at the end of the trip?

A. Yes.

Q. How many miles basically were you driving the freight?

A. Approximately, 10 miles.

Q. When you picked up the freight, where did you pick it up from?

A. From our Erie terminal.

Q. Is that Central Transport's terminal?

A. Yes, it is.

Q. Mr. Meabon, does the class of the freight matter for you in any way in terms of how you handle the freight?
A. No, it doesn't, I treat every one the same, carefully.
Q. And, lastly, if you see a description of the freight listed on the delivery receipt or some other type of document that you might deal with that's described as one crate or one skid, is that a common description that you see?

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A. Yeah, that can be part of the description. Some going into more detail than others.
Q. If you see a description that says one crate, though, does that prevent you from picking it up?
A. No, it doesn't.
MR. KNOX: Thank you.
CROSS-EXAMINATION
BY MR. DELANEY:
Q. Mr. Meabon, my name is Patrick Delaney, I'm here for Accu-Spec. What kind of a trailer were you driving or what kind of a truck and trailer were you driving on January 14, 2003, when this delivery was being made to Accu-Spec?

A. The truck was a Ford L-9000, the trailer was a 48-foot box trailer.

Q. Does that mean it's an enclosed trailer?

A. Yes.

Q. Not a flatbed?

A. Correct.

Q. As I understand it, when you come to work in the morning, you come to the Central Transport warehouse and the truck's already loaded for you?

A. Yes, it is.

Q. So you don't participate in the loading of the truck at all?

A. No, I don't.

Q. Is that done during the night or the previous business day, how does that work?

A. At that facility at the time it was done in the early morning.

Q. And you don't, I presume from the fact that this 48-foot trailer is full, you don't really have an opportunity to go in

and look at the cargo at all?
A. No, I don't.
Q. So you then leave the Central Transport depot and you drive right to Accu-Spec, is that right?
A. That's correct.
Q. Because that's the first piece of cargo to come off?
A. Yes.
Q. Now, when you leave that day, do the people at the depot give you a list of your cargo and the locations to be delivered?
A. The only thing I have is a stack of delivery receipts, that is the list, they're all in order.
Q. Do you receive any sort of history with regard to the cargo; for example, this particular crate, where it has been between California and Erie County, Pennsylvania?
A. No, I don't.
Q. That's not really important to you, I presume?
A. No, it's not.
Q. What is the height of that box trailer, what I call a box

trailer, from the bed to the ground?
A. I'd say approximately three-and-a-half to four feet.
Q. All right.
A. Probably four feet.
Q. In the process of unloading this crate at the Accu-Spec facility, did you see anything happen that would have caused damage in that unloading process?
A. No, I did not.
Q. I saw that Mr. Cohen put on the screen that receipt that was signed by you and signed by someone from Accu-Spec, do you remember that document?
A. Yes, I do.
Q. Now, that's not a bill of lading, though, is it?
A. No, that would be called a delivery receipt.
Q. Okay. Do you know where the bill of lading would be for this piece of cargo?
A. No, I don't.
Q. So when you're given cargo to deliver locally, they don't hand you the bill of lading to turn over to the recipient of the cargo?
A. No.

Q. You say that you were on the Accu-Spec property long enough to see the people at Accu-Spec open the crate?
A. Yes.
Q. You could see the damage to the crate, could you not?

A. Yes, I could once it was pointed out to me, yes.
Q. That was after it was off the trailer?
A. Yes.
Q. Is it correct that when it was on the trailer, you really couldn't see any damage to either the crate or the equipment?
A. That's correct.
Q. How close did you get to this crate once it was opened and how close did you get to this piece of equipment inside?
A. Probably within three to four feet.
Q. Did you see damage to the equipment?
A. That I'm not qualified to say, I mean, I could see the machine had rolled to one side of the crate. I don't know about the damage itself.
Q. Let me show you a picture, see if the picture -- this is Plaintiff's Exhibit 15 -- does Plaintiff's Exhibit 15 depict

anything you saw that morning when you delivered the equipment to Accu-Spec?

A. I don't really remember seeing that. I just remember seeing the machine up against the side of the crate.

Q. Did you touch the machine, the outside of the machine?

A. No, I did not.

Q. Could you tell from your observation what it was made of?

A. Metal. I've been round long enough, I know it's made of steel.

Q. Could you see the disassociation that is depicted in the

steel on this Exhibit 15?

A. Yes, I do.

Q. But you don't recall seeing that type of damage in the limited view you had of the machine?

A. No, I don't.

Q. Now, once you get a signed receipt, you've got a trailer full of cargo, I presume you have to get out of there to deliver the rest of your freight?

A. Yes, I do.

Q. After these events, did Mr. Cackowski from Central Transport contact you to find out what you knew about this incident?

A. No, he did not.

Q. Did you ever work on a dock at any of Central Transport depots?

A. No, I haven't.

Q. Did you ever watch the cargo being loaded on to any of the trucks?

A. On occasion if, you know, a trailer is late or something, I might see forklift operators loading.

Q. Do you know what the capacity of the forklifts are on the Central Transport docks?

A. No, I do not.

Q. Do you know if they're greater than a 7,500 pound capacity?

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A. No, I don't.

MR. DELANEY: Thank you very much.

THE WITNESS: You're welcome.

THE COURT: Anything further?

MR. COHEN: Nothing further, your Honor.

THE COURT: Thank you very much, sir, you're free to go. Does that wrap up your case, Mr. Cohen?

MR. COHEN: Yes, your Honor, Central Transport has no further witnesses.

THE COURT: Are you all moved in by way of exhibits?

MR. COHEN: I believe so.

THE COURT: All right. Mr. Knox.

MR. KNOX: Thank you, your Honor. Your Honor, I'd like to call Chris Fanzini to the stand, please.

THE COURT: All right. Mr. Fanzini, come on up here, first spell your name for my court reporter before you're sworn in.

THE WITNESS: Chris Fanzini, F-a-n-z-i-n-i.

CHRIS FANZINI, LOGISTICS PLUS WITNESS, SWORN

DIRECT EXAMINATION

BY MR. KNOX:

Q. Good morning, Mr. Fanzini.

A. Good morning.

Q. Sir, could you please state your full name?

A. Donald Christopher Fanzini, Jr., I go by Chris.

Q. Are you currently employed?
A. Yes.
Q. Where are you employed?
A. The UPS store.
Q. What is the UPS store?
A. It's a franchise out of UPS, shipping and packing company, lots of walk-in counter people.
Q. Is anybody from Logistics Plus affiliated with you at the UPS store?
A. Yes.
Q. Who is that?
A. That's Jim Berlin.
Q. Who's Jim Berlin?
A. He would be one of my partners.
Q. Did you have any previous employment prior to the UPS store?
A. Yes.
Q. And where was that?
A. I worked at Logistics Plus.

Q. When were you there?

A. 2003, basically, for about a year, the year 2003.

Q. Were you there at the beginning of 2003?

A. Yes.

Q. Mr. Fanzini, what is Logistics Plus?

A. Logistics Plus is a worldwide logistics company, move

freight all around the world, big, small. Just a logistics company.

Q. Do you have occasion when you were working at Logistics Plus to negotiate freight for the shipments?

A. Yes.

Q. Do you have any other experience in the shipping industry, the freight industry?

A. Yes, I do.

Q. What is that experience?

A. I got about 17, 18 years involved with transportation. I was a truck driver for five to six years, I worked on a dock for three to four years. I was the terminal manager. I packed freight, towed motor freight, tarped freight. Used rail, planes, boats, internationally. Basically, I did everything when it comes to freight.

Q. Have you ever operated a forklift?

A. A thousand times.

Q. Mr. Fanzini, when working at Logistics Plus, what were your responsibilities?

A. I was somewhat basically moving freight for people, calling new contacts, trying to grow the local companies, trying to get them into Logistics Plus, help move freight and grow our business.

Q. When you say contacting people, what type of people or companies are you talking about?

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A. The traffic managers, owners, people that are in contact with moving freight for companies they work for.

Q. Where is Logistics Plus located, incidentally?

A. They are right down in Union Station, right down here.

Q. That's in Erie?

A. Yes.

Q. How many employees did they have around that time in

2003?

A. Probably in the seventies, I'm not positive on that.

Q. Mr. Fanzini, during your time at Logistics Plus, as part of your responsibilities, were you in contact with various trucking companies, carriers, throughout the country?

A. Yes, I was.

Q. What was the nature of your contact with these carriers?

A. Basically, negotiating prices for people. Picking companies, basically, I'm taking a map, I'm picking a company that's good in this part of the country, picking a company that's good in this part of the country, negotiating rates and finding out what's the best carrier to move freight for everybody. Everybody I've contacted to move freight from the east coast to the west coast, lot of international, I have to pick and choose the best situation and the best freight companies to move this freight.

Q. In carrying out your responsibilities, did you become familiar with various trucking company rates?

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A. Absolutely.

Q. Were you familiar with Central Transport?
A. Yes, I was.
Q. Were you familiar with their rates?
A. Yes, I was.
Q. Compared to some of the other trucking companies you dealt with, how did their rates compare?
A. Their rates were lower. Sometimes a lot lower.
Q. Are there any pricing schedules at Logistics Plus in terms of how you charge a customer?
A. Repeat that one more time.
Q. Are there any pricing guidelines at Logistics Plus that help you determine --
A. Yes, there's tariffs, there's contracts, there's discounts of our contracts.
Q. Did Central transport, to your knowledge, when you were working at Logistics Plus, have a discount?
A. They did have a discount, yes.
Q. What was that discount?
A. It was 40 percent off of our rates.
Q. How did that compare to other carrier discount rates?
A. The closest discount was 30 percent, everybody basically

ran about 22 to 25 percent off of our rates.

Q. So Central Transport was one of the cheapest carriers that you dealt with?

A. Absolutely.

Q. Mr. Fanzini, does part of what Logistics do, does price enter into how they carry out their services?

A. As to their price?

Q. Yes.

A. Yes, absolutely.

Q. How so?

A. Well, we try to work the best price, we're growing our business, we're trying to get the best price for all different customers, yes.

Q. Let's say I want to ship a piece of freight, why would I go to Logistics Plus, how would you help a customer?

A. Because we know the proper way to ship your freight.

Q. Could I get a better price by going through Logistics Plus or could I get a better price if I just call up the truck company myself?

A. You'll get a better price going through Logistics Plus.
Q. Why is that?
A. Because Logistics Plus, just like a lot of big companies in this world, General Electric, they have good discounts with these trucking companies, trucking companies want to haul freight. What happens is we have salesman come in, we negotiate prices. Hey, listen, if you want what we ship, you've got to help us out with the prices. Basically, our prices are the best price to negotiate.

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Q. Lastly, just to fill out the background picture here a little bit, does Logistics Plus operate any trucks?
A. No, not one.
Q. Are you in the business of packing or handling freight?
A. No.
Q. Mr. Fanzini, do you remember a transaction involving Accu-Spec back in January of 2003, which is the subject of this case?
A. Yes.
Q. And were you involved in that transaction?

A. From minute one.

Q. How were you involved first?

A. I basically set up the shipment.

Q. And how was the shipment set up?

A. I get a phone call --

Q. Who called?

A. Jim Mullen from Accu-Spec. He gives me a call, he says I have a crate to pick up out in California. I get the size, I get the weight, find out where it's going. I go right on my computer and give him a price right there.

Q. So if I understand your testimony correctly, Mr. Mullen contacts you by phone?

A. Yes.

Q. Is that the first event in this transaction?

A. Yes.

Q. Did you call him first?

A. No, he called me.

Q. Incidentally, who is Mr. Mullen?

A. It's my father-in-law.

Q. And he works at Accu-Spec?
A. Yes -- no, well, he used to.
Q. So he calls you up, what specifically did Mr. Mullen say to you?
A. He says, Chris, I need to get a good price on a crate that needed to be picked up. I asked him the size of it, where it's at. Basically, I just gave him a rate.
Q. Generally is that the kind of information that you request when making a quote?
A. Yes.
Q. And when he gave you that information, what did you do with that?
A. I just got right on Logistics Plus database. We have all the discounts and everything set up, we give rates right away to customers, that is one of the better things that Logistics Plus has. I punched in the numbers, gave him a rate. Basically, that's it.
Q. Are you doing this right at your desk, at your computer?
A. Yeah, just kind of like this, punching in the numbers, the rates, the discounts. I see, what we do, I punch in my rate, then I add on what I want to make. Basically, this is

what I have to pay, how much do I want to make off of this. What do I think it's worth, do it like that. That's how we make our money.

Q. Mr. Fanzini, in making a quote such as the one in this case, do you have to class the item that is going to be shipped?

A. Yes.

Q. And did you in fact initially class this item after speaking with Mr. Mullen?

A. Yes.

Q. What did you class it at?

A. I classed it at 100.

Q. Why did you do that?

A. The size, the density, just from being in trucking all my life, you go off of how much room the trailer takes, what the weight is of the crate, and I basically figure out class like that.

Q. After you classed it and punched in all the other information, the weight and the size, in other words, the crate, did you generate a quote in fact?

A. I gave him a verbal quote.

Q. And what was that verbal quote?

A. Right around $900, in the $900 area.

Q. Did Mr. Mullen like that price?

A. Well, what he said is, Chris, can you do any better.

Q. How did you respond to that?

A. I said I can try, I can't promise you anything, I can try.

Q. When he said to you, Chris, can you do any better, did you have the capability at that point to re-class that item right there at your computer and give him another quote?

A. Sure.

Q. Did you do that?

A. No.

Q. Why didn't you do that?

A. Because -- if you get caught doing something like that, we're going to end up paying. You don't do that. You just don't do that, that's not the way it happens.

Q. You could have re-classed it but you didn't?

A. Right there I could have did it.

Q. When Mr. Mullen tells you to see if you can get a better deal here, what did you do next?

A. I called my Central Transport salesperson, which I like to do chain of command. Basically, you can go basically to the big pricing departments. So I called Central, which is George. I just said --

THE COURT: Last name?

THE WITNESS: Horetsky. Basically, I just said hey, I got this skid out in California, can we do any better on our price. It's called like a spot quote.

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THE COURT: Could you repeat that again, I'm having trouble hearing you, start that all over again?

THE WITNESS: When I called George Horetsky, I asked him if we can do any better on the price off of our rates. It's called a spot quote. All trucking companies have them, you can call them, this is a one time deal. It's taking up 10 foot of trailer, it's 5,000 pounds, this is the rate I'm getting, can we do anything different about it. Basically, the conversation we had was two to three minutes, it wasn't long at all. He basically said just drop it down to 50 on the bill. When you drop down a class, that just helps the price right there. He did what he was -- I don't know if you're supposed to do, that basically how the business works. You get the freight picked up, you get it moved, it happens, everybody is usually happy about it.

BY MR. KNOX:

Q. Are you saying that Mr. Horetsky changed the class on the freight in your conversation?

A. Yes.

Q. Is that commonly done?

A. Once in a while, yes.

Q. When you first had your conversation with Mr. Horetsky, did you tell him what your initial thought was about the class?

A. Repeat.

Q. When you first talked to Mr. Horetsky about getting a better quote, did you tell him what you thought the class was?

A. Yes.

Q. And what did you tell him about that?

A. I just told him, actually, I think he even asked me what was the class, it's a Class 100, that's what I have it rated at. This is the weight, this is the size. He says just drop it down to 50.

Q. Did you at any time suggest to Mr. Horetsky that he should change the class?

A. No.

Q. Why would somebody change the class on an item?

A. Just for price, just to help out, doing a favor, get the job done.

Q. Mr. Fanzini, had you dealt with Mr. Horetsky before on other shipments?

A. Yes, I did.

Q. Did you have a good relationship with him?

A. Very good.

Q. Did you have an understanding he understood you during your transactions?

A. Sure.

Q. At any point during your conversation with Mr. Horetsky, did he say that I don't have enough information to give you a

quote?
A. No.

Q. And, again, what information did you give him?
THE COURT: This is the last time through this, we're repeating ourselves.
MR. KNOX: I'll withdraw that.
BY MR. KNOX:
Q. Mr. Fanzini, what was the quote eventually given by Central Transport for Accu-Spec?
A. It was -- say that again.
Q. What was the quote eventually given to you by Mr. Horetsky following the phone call?
A. It was $590.
Q. Did you communicate that quote to Mr. Mullen at Accu-Spec?
A. I called him right away.
Q. Did Mr. Mullen express that he liked that quote?
A. Yes, he did. He said that's a good price, we'll take care of it.

Q. Ultimately, did Accu-Spec agree to have it shipped at that rate?
A. Yes.
Q. What did you do next at that point?
A. Basically, I just got the information on where it was to be picked up, where it's delivering to, the contact name of the shipper, which would be Dage out in California. I need to contact them to make sure the skid's right and ready to go.

And then I will contact the trucking company to send the truck out for pick up.
Q. Do you use any of the information that you had from Mr. Mullen to generate the bill of lading?
A. Yes, I did.
Q. Did you in fact generate the bill of lading?
A. Yes, I did.
Q. Mr. Fanzini, I want to put up on the screen here a document that's been offered into evidence as Plaintiff's No. 25, have you seen that document, sir?
A. Yes, I have.

Q. What is that document?

A. This is the Logistics Plus bill of lading that we send to the shipper.

Q. And the quantity and the description and the weight and the class listed there, who put that information on there?

A. I did.

Q. What was the source of that information?

A. What I was told from Accu-Spec.

Q. And, Mr. Fanzini, let's backtrack a little bit. Were there two quotes here, basically?

A. Yes.

Q. A quote you gave and a quote that Central Transport gave?

A. Yes.

Q. Yesterday Mr. Mullen -- I'm sorry, Mr. Carlson testified

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that, if I'm characterizing his testimony correctly, that price didn't matter with regard to this shipment. Did you get that sense in your conversations with Mr. Mullen?

A. He asked me to get a better price or see if I could get a better price.

Q. Do you know if Mr. Mullen knew that Logistics Plus had the wherewithal to negotiate better prices?
A. I think he does.
Q. Mr. Fanzini, yesterday Mr. Mullen testified and admitted that he never told you that what was being shipped was an X-ray machine, do you agree with that?
A. Yes.
Q. Did Mr. Mullen at any time tell you or write to you saying that this X-ray machine was worth $120,000?
A. No, he didn't.
Q. Did he talk to you about any other characteristics, it's fragile or anything like that?
A. No.
Q. Mr. Fanzini, I want to put up on the screen another document that's been marked CT-6, do you see that document, sir?
A. Yes, I do.
Q. What is that document?
A. That is a written quote.
Q. And who generated that quote?

A. Logistics Plus.
Q. Did you play any role in generating this quote?
A. Well, not typing it out or anything, I'm the one that gave the quote.
Q. Is this a document that is routinely used by Logistics Plus in making quotes?
A. Yes.
Q. I want to show you some information right here. Do you see where I marked that?
A. Yes.
Q. What does that say?
A. It says "quotes are based on information given at time of quote. If variables such as dimensions, class and/or weight change, this quote will no longer be valid."
Q. Generally speaking, what does that mean from your perspective?
A. Well, basically, if somebody ships a crate and I don't want to use the word bong, but if there's some drugs or something in it, this is telling you that everything is nul and void here, off the information that you gave us. Plus a lot of people when they ship things, they will maybe not put the right

weight down, and a lot of things go off the weight, so there's a lot of things being re-weighed on the systems, all trucking companies. Basically, this holds if you lied to us, this quote is not valid anymore.

MR. KNOX: Thank you. Judge, I'd like to move that document into evidence.

THE COURT: It's admitted. I'm sorry, could you identify it?

MR. KNOX: It's identified as CT-6.

THE COURT: All right.

BY MR. KNOX:

Q. Mr. Fanzini, I'd like to you show you the bill of lading very quickly again here?

A. Okay.

Q. The description of the item here, it's listed basically one crate on the bill of lading, do you see that?

A. Yes.

Q. Is that a common generic description of freight that you use in carrying out your responsibilities?

A. Yes.

Q. Do truck drivers, to your knowledge, based on your experience, have any problem in transporting or picking up freight based on that type of description?

THE COURT: Could you repeat that.

BY MR. KNOX:

Q. Do truck drivers or anybody handling the freight, have a problem handling or picking up freight based on a description like that?

A. No.

Q. After the bill of lading is generated by the information given to you about Mr. Mullen, what happens next, what did you do next?

A. After the bill of lading?

Q. After the bill of lading, what do you do next?

A. First I find out when the freight is to be ready to be picked up. I get ahold, I always get in contact, I don't want to send drivers in waiting for freight that isn't ready. I contact the people out there, find out if it's ready, get ahold of the trucking company and set up a pick up.

Q. Did you in fact do that?

A. Yes, I did.

Q. Did you have any contact with Central Transport during this time?

A. Yes, I did.

Q. Who did you speak with?

A. I don't really have a name, I contacted the California terminal themselves to set up a pick up.

Q. To your satisfaction was the shipment essentially set up?

A. Yes, it was.

Q. What happened next?

A. It got picked up, got moved across the country. Banged up a little bit I presume in delivery hands. I don't know, once the freight is picked up, we call the next day and get the tracking number. And then we relay the trucking number to the

customer. And from there it's in the trucking company's hands.

Q. Did you have any contact with Dage or Central Transport during the time it's coming across the country?

A. No.
Q. After the freight was dropped off at Accu-Spec's facility, were you informed about anything?
A. Yes, I was informed that there was some damage to the crate.
Q. And who informed you?
A. Jim Mullen.
Q. Do you know how he informed you?
A. He called me up from his cell phone, he was out in the parking lot. He said we have -- the crate is banged up a little bit. And we were going to open the crate.
Q. Do you remember when approximately, in relation to when the freight was dropped off at Accu-Spec, that Mr. Mullen contacted you about this?
A. He told me that it was -- basically, what was said earlier today, I don't know, I'm not positive, but he said he could still see the Central Transport truck before it would get on I-79, so it was on that main road out there. So it had to be two minutes, three minutes, I would imagine, right after the off loading. I wasn't there, so I'm not positive on that one.
Q. After you were contacted, did you then do anything at

that point?

A. Actually, I called George right away, George Horetsky.
Q. That's the gentleman from Central Transport?
A. Yes.
Q. What did you tell him?
A. I said this crate was damaged, is there a way you can get out there and take a look at this thing.
Q. What did he say?
A. He said yes.
Q. Did he come up?
A. Yes.
Q. When did he come up?
A. I'm not positive on time, he was up there that day.
Q. Did you go and inspect the freight at some point?
A. No, I didn't.
Q. Did you view the crate at any point in time after it was delivered?
A. Yes, I did. Not that day, but yes, I did.
Q. When did you view it?

A. Actually, the day after I had it picked up and brought to our warehouse so we can get an inspector to come and inspect this. Right away that's what you have to do for claims. The inspection, I had it set up, he came and inspected it.
Q. Mr. Fanzini, when you first started talking here today, you talked a little bit about your background in the shipping and trucking industry.

A. Sure.
Q. As a truck driver or a forklift driver, had you ever had an occasion, separate from this, in dealing with damaged freight?
A. Yes.
Q. Had you ever inspected damaged freight prior to this transaction?
A. I've seen it, inspected it, looked at it. I'm not an inspector, I've looked at it, yes.
Q. Have you as a truck driver or a forklift driver, ever damaged freight yourself?
A. Absolutely.

Q. After you came to view this crate and the damage to its contents, what did you notice?
A. I just noticed that the crate was handled, I don't know where or how, but it was handled pretty rough.
Q. Why do you say that?
A. This machine had a movement inside, inside the crate and it shouldn't. It should be setting right in there, it should not move, should get somewhere safe, not get banged around.
Q. Do you have any experience in packing freight?
A. No, not really.
Q. Did you notice anything about the packing on this crate?
A. Well, it looked kind of chintzy to me.
MR. DELANEY: Your Honor, I would object, I don't

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think there is a foundation.
THE COURT: Sustained, there is no foundation. Disregard that comment.
BY MR. KNOX:
Q. You don't need to talk about packing, Mr. Fanzini.
A. Okay.

Q. After you viewed the freight, did you have a conversation with Mr. Horetsky about what was going to be done here about this situation?
A. Yes, I did.
Q. What was that conversation?
A. I just said, I asked George, I said how do you want to handle this right now.
Q. What did he say?
A. We'll start a claim, start the paperwork.
Q. And what did he say?
A. He said you know, after looking at it, this will be handled, okay. So I figured --
THE COURT: You're mumbling, I can't hear you.
THE WITNESS: I figured, he said it would be handled, after looking at the freight itself.
BY MR. KNOX:
Q. When he said to you that it would be handled, how did you interpret that?
A. That the claim through Central Transport and Accu-Spec

would be taken care of, the damage to the freight.
Q. Mr. Mullen testified yesterday that he sent out a letter to pretty much everybody involved here, to Dage, to you, to Central Transport, a few others, basically saying like all these people are attempting to resolve this claim, did you ever see that letter, sir, in February?
A. Yes.
Q. He also said something interesting yesterday that after that letter went out, nobody responded to the letter; do you agree with that?
A. No, I don't.
Q. Why don't you agree with that?
A. Because I responded to the letter.
Q. How did you respond?
A. It wasn't to the response that he wanted to hear. Basically, I kept on trying to get Central -- this is now between Accu-Spec and Central Transport. I can't respond to what's going on with the claim, I just call the up aboves, like I said, the chain of command, I go a step higher. We need to get this claim taken care of, what do we have to do here. And I let my father-in-law know what I was doing. I have contacts with him about that. But probably not what he wanted to hear.

I just give him what I can.
Q. How many times would you estimate that you were in communication with Mr. Mullen or anybody else at Accu-Spec

during this period of time?
A. Boy, a dozen times, I would think. There was a lot of phone calls made. From the day on, for the first couple weeks, we were on the phone trying to get this thing moving right away.
Q. Eventually, were you made aware of the fact that Accu-Spec made a formal claim against Central Transport?
A. I think so -- I can't remember, yes.
Q. Do you know in approximately April of 2003, whether Accu-Spec made a formal claim against Logistics Plus?
A. Yes.
Q. How did they make a claim against either party -- how was that done, how do you make a formal claim?
A. Well, through the trucking companies. There's proper paperwork you have to fill out. I'm really not positive, basically, just get a lawyer and you start a claim then.

Q. Lastly, Mr. Fanzini, knowing what you know now, this obviously was an X-ray machine that was worth considerable value, estimated at $120,000. If Mr. Mullen had told you that this was an X-ray machine, that it was worth $120,000, would you have done anything differently in setting this shipment up?

A. Absolutely.

Q. What would have you done differently?

A. I would have shipped it differently. I would have negotiated different prices with different carriers. Like we

said before, Central, they get the job done but they are the -- the less expensive company in the trucking industry. So read into that, but I would definitely move it a different way.

Q. How would you move it a different way?

A. I would have gave Accu-Spec different ideas. I would have moved them on just one truck. You've got to pay the price, it's a damageable thing, you don't want to put any other freight on this trailer with this thing. You really would put it --

Q. Why would you have done that?

A. With a $150,000 X-ray machine, you want to get the thing there, not just price, you want to get the thing there in good shape.

MR. KNOX: Thank you, Mr. Fanzini, I have nothing further.

CROSS-EXAMINATION

BY MR. DELANEY:

Q. Mr. Fanzini, I introduced myself out in the hallway, I'm Pat Delaney, I'm here for Accu-Spec. Are you aware that your testimony differs from that -- your recollection that you have differs from that of your father-in-law with regard to how the transaction came down?

A. If you say that, I wasn't here yesterday.

Q. You've indicated for us that when you first had this call from Mr. Mullen, that you classed the equipment -- I'm sorry,

you classed the cargo as 100, Class 100?

A. Yes, I classed the freight at 100.

Q. And that produced a price of about $900?

A. Yes.

Q. How was it that you chose Class 100?

A. Size and weight.

Q. Is Class 100 a dense freight or a less dense freight -- I'm sorry, is Class 100 a more dense freight or a less dense freight than Class 50?

A. Less dense freight.

Q. This is two-and-a-half tons, why, again, did you pick Class 100 for a crate that would contain something weighing two-and-a-half tons?

A. That is the proper class actually.

Q. I see. So the Class 100 has that particular weight parameter?

A. Yes.

Q. We saw an exhibit from Central Transport yesterday, I think, and it's Exhibit CT-4. And this is a page from the National Motor Freight Classification book, are you familiar with that book?

A. Yes, I am.

Q. Is that how one person in your position goes about classifying freight?

A. If you need to, yes.

Q. It's curious because it has a reference to X-ray
machines, do you see that?
A. Yes, I do.
Q. And X-ray machines not exceeding -- X-ray machines not
exceeding $30 a pound. That would be this piece of machinery?
A. Yes, sir.
Q. Can you tell us what the classifications for X-ray
machines which have a value not exceeding $30 a pound would be?
A. Class 100.
Q. So that's the class that you picked right off the bat?
A. Yes.
Q. Yesterday we had George Horetsky testify.
A. Okay.
Q. And he talked about your conversation with him -- about
rate, about price?
A. Okay.
Q. He said that -- first of all, you did not tell him
anything about the contents of this crate?
A. Correct.

Q. And he said you called and said can you get me a Class 50 rate. I asked him, did you understand that Chris was telling you that this was a piece of freight that was not fragile, that he was expressing to you the character of the freight and he said no, he was asking me for a price. Do you agree that that's what you were asking him for?

A. No, not the way you said it.
Q. What do you recall that conversation to be?
A. If I wanted to class it at 50, I could have done it myself, I wouldn't have to call anybody. I could do it right off the machines. I called him to get a spot quote. Like I explained before a spot quote, is a one time deal where you could ask the pricing department. Maybe somebody's got a trailer, not everybody is coming out of California at the time, you know, we'll put some freight on for this price. Maybe if not, they have a chance of booking freight. I called him for a spot quote.
Q. Is that the only transaction you had with him, just a spot quote?

A. Until after.
Q. He gave you the spot quote and you took it back to Mr. Mullen?
A. He basically said drop it to a Class 50. I got the price right off the database then.
Q. All right. The point of my conversation or my questions with Mr. Horetsky and what I think he acknowledged for me, was that you had not misled him about the nature of this freight. Would you agree that you didn't try to misrepresent the nature of the freight to Mr. Horetsky?
A. No, I told him what I knew.
Q. You told him what you knew?

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A. Yes.
Q. We've seen this quote that you prepared and sent on the Logistics letterhead?
A. Okay.
Q. Do you recall an e-mail that was sent by Mr. Mullen to you, I believe describing freight as equipment?
A. Actually, I've seen it recently. I don't remember, but

I've seen it, yes.

Q. Do you acknowledge that you would have received that?

A. Yes.

Q. And do you acknowledge that you were given information to the effect that the freight was to be picked up at Dage Precision Industries?

A. Yes.

Q. And you were given an accurate number for the weight of the freight?

A. Yes.

Q. Were you given an accurate description of the dimensions of the freight?

A. When you say accurate, yes, I got what they sent me. Like I said, I never seen the freight. I'm going off of what my customer tells me, yes.

Q. And, finally, did Mr. Cackowski, the claims person for Central Transport, ever contact you as part of his investigation into Accu-Spec's claim?

A. I don't think I ever talked to that man.

MR. DELANEY: Thank you, very much.

THE COURT: We're going to take a short recess.

(Recess from 10:04 a.m.; until 10:15 a.m.)

THE COURT: All right, Mr. Cohen.

MR. COHEN: Thank you, your Honor.

CROSS-EXAMINATION

BY MR. COHEN:

Q. Good morning, Mr. Fanzini, my name is Jeff Cohen, I'm an attorney that represents Central Transport in this case.

A. Good morning.

Q. You've testified that Logistics Plus is a logistics company, is that correct?

A. Yes.

Q. Is it fair to say that their job is to help shippers move freight around not only the country but around the world?

A. Yes.

Q. Many times is it fair to say Logistics Plus sometimes has employees actually in the facilities of shippers to help them with their logistics needs?

A. Yes.

Q. You testified that you have a lot of experience and sounds like you have a lot of experience with respect to

transportation issues, correct?
A. Yes.

Q. Sounds like you do everything from driving a truck to --
A. Yes.
Q. To writing the bill of lading. Would you consider Logistics Plus a very sophisticated logistics company, as far as sophisticated knowledge in the transportation industry?
A. Yes.
Q. Are you familiar -- well, I presume that you are familiar with the paperwork which is necessary to move freight from point A to point B?
A. Yes.
Q. And in fact you draft, you write some of this paperwork, at least fill it out, correct?
A. Yes.
Q. In this case there is a document known as a bill of lading, you've heard the term bill of lading before, right?
A. Yes.
Q. Bill of lading is pretty much the governing document

which controls the transportation of the freight, is that right?

A. Yes.

Q. In this case Logistics Plus is sophisticated enough to have its own bills of lading, correct?

A. Yes.

Q. Many shippers because they don't ship that often, don't have their own bill of lading, is that correct?

A. I'm not sure about that.

Q. Like Accu-Spec, they didn't have their own bill of lading, correct?

A. They could have one.

Q. Right, did they?

A. They didn't on this case.

Q. Have you read the Logistics Plus bill of lading?

A. Not really.

Q. It's small print in there?

A. Yes, some fine print.

Q. How many times have you used the Logistics Plus bill of

lading?
A. Few hundred.
Q. There's some things on there in the top which address the terms under with freight moves, did you know that?
A. Do you have one I'll read it.
Q. I absolutely do.
MR. COHEN: Your Honor, I'd like to use the easel, I have a couple blowups.
THE COURT: That's all right.
MR. COHEN: I'm going to provide him with a copy, this is a copy of the existing exhibits.
BY MR. COHEN:
Q. For everyone's information, this is CT-1, just a blowup of CT-1. I'll put it on the screen for the witness. All

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right. You already testified that is the Logistics Plus bill of lading that you filled out for transportation in this case, correct?
A. Yes.
Q. Okay. The text on the top of this bill of lading, also,

Mr. Fanzini, it's Exhibit 1 in that notebook in front of you, there's a couple different ways to evaluate this, it's the same document. The text on the top of this copy of the bill of lading is not clear, obviously, because it's been faxed around, is that right?

A. Yes.

Q. The one that you prepared, the one that you filled out that text would be legible, of course, correct?

A. Yes.

Q. There's another exhibit which I'll direct everyone's attention to, it's Exhibit CT-13, and in your book, sir, it's tab number 13?

A. Okay.

Q. Could you tell the jury what this document is?

A. This is a list of Logistics Plus bill of lading from -- what do you mean, it's a Logistics Plus bill of lading, what do you want to know?

Q. I'll help you. Is this the Logistics Plus bill of lading which governs the transportation of the X-ray machine in question in the litigation from the Dodsworth warehouse in Erie

to 1345 West 11th in Erie?
A. Yes.
Q. Did you prepare this bill of lading?
A. Yes.
Q. Now, the text on the top of this bill of lading, well, is the same form bill of lading, it's just for a different movement?
A. Yes.
Q. The text on the top of the bill of lading is the same text that what was on top of the original bill of lading used for the shipment?
A. I don't know, I can't read it, it looks kind of big.
Q. Did you use the same form?
A. Yes.
Q. All right. Now, that language up there, that little text up there where it says "received," did you ever read that paragraph?
A. No.
Q. In the hundred times that you used the bill of lading?
A. No.

Q. Was it a hundred or a thousand?
A. Between 100 and a thousand.
Q. How many times have you used the bill of lading, if you know?
A. I don't know.

Q. Was it 10,000?
A. No.
Q. This document says "received, subject to the classifications and tariffs in effect on the date of the issue of this bill of lading." Do you know what a tariff is?
A. Yes.
Q. What's a tariff?
A. It's a pricing agreement between trucking companies.
Q. Is there anything else a tariff could be?
A. Not that I know of.
Q. Do you know that trucking companies have tariffs which basically rules circulars governing the transportation when trucking companies are moving freight?
A. Repeat that, please.

Q. Absolutely. Do you know that trucking companies have their own set of rules by which they move freight?
A. Yes.
Q. They sometimes are referred to as tariffs?
A. Yes.
Q. This sentence up there, "received, subject to the classifications and tariffs in effect on the date of the issue of this bill of lading," isn't it fair to say that is referring to a trucking company tariff because you're preparing the bill of lading at the moment of or by a particular trucking company, isn't that correct?

A. Yes.
Q. Also, further down in that paragraph right about -- do you see that circle on the screen?
A. Yes.
Q. Where it says number two -- the sentence is long, but tell me if I summarize portion two correctly.
THE COURT: Do this, see the big board down there. Go down and take a look at that. Keep your voice up, your back

is going to be to my court reporter, okay?

THE WITNESS: Yes, sir.

BY MR. COHEN:

Q. The one that is legible is CT-13, this text here. I'm referring to where it says number two, okay. This is a long sentence. But the reason I'm focusing on section two, it addresses the motor carrier classification or tariff. The other part of the sentence deals with if it's a rail or rail water shipment, okay. Do you understand why -- let me ask you this. Can your bill of lading be used for rail shipping?

A. Yes.

Q. Have you used this bill of lading for rail shipments?

A. I haven't.

Q. Okay. Can this bill of lading also be used -- obviously, this bill of lading could also be used for trucking shipments, correct?

A. Yes.

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Q. And in this case it was?

A. Yes.

Q. In this section, number two of the sentence, it says effectively, tell me if I'm wrong, in these movements by a motor carrier like Central Transport, the motor carrier classification for tariff applies, is that correct?
A. Yes.
Q. And when referring to the motor carrier classification, in this case that's Central Transport, is that correct?
A. Yes.
MR. COHEN: Your Honor, I think we're done looking at the small text, the witness can sit down.
THE COURT: All right, you can resume the witness stand.
BY MR. COHEN:
Q. How many trucking companies -- let me ask you this. You, being Logistics Plus, moves freight with a lot of trucking companies, correct?
A. Yes.
Q. With respect to Central Transport, understanding that the movement was based on the Central Transport trucking tariff and that you were providing a logistics service to shippers, did you ever take a look at the Central Transport tariff?
A. I never read it myself, no.

Q. Are you familiar with the term limitation of liability?

A. I heard it before.
Q. You're in the shipping logistics business, correct?
A. Yes.
Q. You limit your liability, something that is an important thing to do?
A. Yes.
Q. Why is it important to limit your liability in the transportation business?
A. If I'm in the right line here, I think for claim reasons.
Q. Right. You know with respect to a claim if a carrier has an appropriate limitation of liability, that will cap the amount of the claim, is that right?
MR. KNOX: Objection, calling for a legal conclusion.
THE COURT: It's not tied to anything, it's speculative, sustained.
BY MR. COHEN:
Q. I'd like to direct your attention to Exhibit 3, CT-3, it

happens to be in that book again in front of you. If you could look at the first page for a moment, would you agree that this is the Central Transport tariff CTII 100-C, is that what it appears to be?

A. Of what I'm seeing, yes.

Q. Have you ever looked at this document?

A. No.

Q. Have you ever asked anybody at Central Transport for their tariff?

A. I never did, no.

Q. The bill of lading that you issued indicates that motor carrier classification or tariff is a part of the governing documents here. Why didn't you want to ever take a look at the tariff?

A. Just never had to.

Q. Do you know what's in a trucking company tariff?

A. Basically I do, yes.

Q. What's in there?

A. Rules, regulations, standards. I can't verify everything, but --

Q. How about limitation of liability?

A. Could be.

Q. I'd like to direct your attention to -- actually, sir, I think in the original there's a pink tab, turn to where the pink tab is, maybe tell me what the number at the bottom right-hand side is?

A. CT0238.

Q. If you could turn to CT0237, that's the page I'm looking for. And tell me when you're on that page, sir?

A. 0237?

Q. Yes, sir.

A. I'm on it.

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Q. At the top it says "used articles or commodities," correct?

A. Yes.

Q. Because you said you have not read the tariff, I'm assuming you never read this provision in the tariff, is that correct?

A. Correct.

Q. When you are shipping freight for a customer -- let me ask this. If you're shipping freight for a customer, isn't the liability, the limitation of liability for that freight something important that you want to know?

A. I would like to know that, yes.

Q. And the reason that you, as the sophisticated logistics professional would like to know that is because you need to know that to properly convey to the shipper what their exposure is if they ship freight, is that correct?

A. No, not really.

Q. Are you telling us that Logistics Plus had no obligation to inform Accu-Spec of limitations of liability with respect to transportation that Logistics Plus was arranging?

A. I would say not.

Q. In this arrangement between Accu-Spec and Logistics Plus, who's the transportation expert, Logistics Plus, correct?

A. Yes, sir.

Q. They're the ones with the knowledge, the people, the

manpower, the computers, the know-how to have all the information to help that shipper, correct?
A. Yes.
Q. You wouldn't expect really a shipper that's a non-sophisticated shipper to know the limitation of liability issues with respect to --
MR. KNOX: Your Honor, I'm going to object to that, calls for speculation.
THE COURT: I apologize, I missed the question, could you start it again.
MR. COHEN: Instead I'll ask a different question, maybe less objectionable, your Honor.
MR. COHEN: All right.
BY MR. COHEN:
Q. Is it fair to say Logistics Plus was a company that had contact with Accu-Spec with regards to arranging for the transportation of this freight?
A. Yes.
Q. Central Transport didn't do it, right?
A. No.
Q. George Horetsky didn't call up Mr. Mullen, you did,

right?
A. Mr. Mullen called me, yes.
Q. Whose responsibility was it to make sure that this had proper limitation of liability coverage?

A. Accu-Spec.
Q. You're saying Accu-Spec's job is to ask you what the limitation of liability was?
A. To tell us what we're shipping.
Q. Mr. Mullen is your father-in-law, right?
A. Yes.
Q. Why didn't you just ask him what are you shipping?
A. I don't ask, I treat him the same as I do anyone. I didn't need to.
Q. You're saying because he didn't tell you that was an X-ray machine, that it's his fault if there's a limitation of liability?
A. It's Accu-Spec's fault, yes.
Q. In this case the tariff of Central Transport on CT0237 is the limitation of liability, do you agree with that?

MR. KNOX: Objection, your Honor, again it's calling for a legal conclusion.

THE COURT: Sustained.

BY MR. COHEN:

Q. Let's look at this document, sir. It indicates that "shipments of used articles or commodities will not be accepted by the carrier unless the shipper releases the value to not exceed 10 cents per pound per package or declares a higher value and agrees to pay an additional charge." It goes on to say, "number one, if shipper desires to tender a shipment with

a value in excess of 10 cents per pound, the shipper must indicate the released value on the bill of lading. Carrier will assess an additional charge of 26 cents per each $100 or fraction thereof, declared by the shipper in excess of 10 cents per pound." On the bill of lading that you prepared for Accu-Spec by Logistics Plus, was a value declared?

A. No.

Q. This used articles or commodities item with Central Transport's tariff refers to used articles. Did you ask Mr.

Mullen if the machine was new or used?
A. No, I didn't.
Q. The machine was listed on the document. Why didn't you ask him if it was new or used?
MR. KNOX: Objection, machinery is not listed on any document.
BY MR. COHEN:
Q. I'm sorry, equipment. Because of this limitation of liability, wouldn't it have been important to know if the machine was new or used?
A. It would have been important, yes.
Q. However, you did not convey anything with respect to limitations of liability issues to Accu-Spec, correct?
A. No.
Q. Is it fair to say, although, you have a lot of experience, you personally have a lot of experience in

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transportation, it seems you don't really have much experience with managing liability issues, is that true?
A. No, it's not true.

Q. You are experienced in managing liability issues?
A. Sure.
Q. Are you familiar with a document called the National Motor Freight Classification?
A. Yes.
Q. What is it?
A. That's a book that classifies basically everything in the world that you can ship.
Q. So everything from tables to X-ray machines, I guess, right?
A. Yes.
Q. I'm holding up the book National Motor Freight Classification, it's about two-inches thick and is a softcover book, is this pretty much what it is?
A. What year is that one?
Q. This one is 2004.
A. It's a new cover.
Q. When you need to know the class of a piece of freight, you consult the National Motor Freight Classification, correct?
A. If you need to know one, yes.
Q. How many thousands of different types of freight -- let me ask this. There are thousands of different types of freight

listed in that book?
A. Uh-huh.
Q. It's, I don't know, a couple hundred pages, correct?
A. Yes.
Q. If all you have is a crate, if all you know is that it's a crate, there is no way for you to determine what the classification is without a little bit of guessing, is that correct?
A. Little bit of guessing.
Q. Now, in this case you testified that you guessed based on the crate, the word crate, the size and the weight, this thing was Class 100, is that correct?
A. It was an accurate guess, yes.
Q. Now, with respect to those characteristics, they did not include value. Did you know that value is a consideration in the National Motor Freight Classification guideline?
A. Yes.
Q. Without knowing what was in the crate at all, isn't it possible it could have been classed higher or lower?

A. It could have.

Q. Did you ask the value from Accu-Spec?

A. No.

Q. This is in Exhibit 4 in your book, CT-4, you were shown this a moment ago. This is a blow-up of CT-4. This is a page of the National Motor Freight Classification book, correct?

A. Yes.

Q. And this indicates that -- X-ray machines are actually included in here?

A. Yes.

Q. And there is a value parameter set specifically in the book, is that right?

A. Yes.

Q. Could be Class 100, Class 150, Class 200 or Class 300, is that correct?

A. Yes.

Q. There's no way for you to know based on weight, size and crate, first, that it was an X-ray machine and, second, what kind of X-ray machine it was, how valuable it was, correct?

A. I knew what the class was of the weight. It's just the way it is. You can figure it out being experienced and in trucking, like I said, I class it 100, it was a Class 100.

Q. All right. That's what I'd like to get into, it's very important to classify, what do you mean it's the way it is, why it is the way it is and exactly what is the basis of what your conclusion is?

A. Like I said before, it's off of size and weight.

Q. That's it, size and weight?

A. Size and weight.

Q. Do you need to know it's a crate?

A. Size, weight, skid, a box, a crate, a bag, a barrel, a drum.

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Q. And why for this crate did you pick 100?

A. Because of the size and weight.

Q. Okay. If you could turn to the second page in that exhibit, sir, it's the second page of Exhibit 4. Do you see that page, sir?

A. Yes.

Q. This is the National Classification Committee Value Guidelines, I take it you've never seen this?
A. No.
Q. There's been testimony that value is a consideration in classifications. Here Class 50 items are listed at maximum average value per pound on the dollar, did you know that?
A. No.
Q. Did you ever do any investigation to find that out?
A. No.
THE COURT: Let me counsel at side bar just a second.
(At side bar on the record.)
THE COURT: This isn't by way of interfering, just keeping this moving along. If this guy got it right for the wrong reasons, what are we spending all this time on this for?
MR. COHEN: He got the wrong rate.
THE COURT: He got the right rate, he got the 100.
MR. COHEN: He got a Class 50 rate. He got this

under Class 50.

THE COURT: I have an obligation not to waste the jury's time. He came up with the Class 100 on his own, now he told you five times how he did it on the basis of weight and other factors. He got it, by your lights, right initially, but for the wrong reasons, inadequate reasons. But so what.

MR. COHEN: I can move this along.

THE COURT: All right.

(End of discussion at side bar.)

BY MR. COHEN:

Q. Sir, after evaluating this document and the previous page of CT-4, is it fair to say that value is a factor in determining class?

A. Yes.

Q. All right, I'd like to go over the logistics, for lack of a better term, how the bill of lading gets to the shipper. You filled out the bill of lading?

A. Yes.

Q. And then you faxed it to Dage in California?

A. Yes, you fax it to the contact, wherever it's getting shipped out of.

Q. And then that bill of lading is handed from Dage to the

truck driver, who comes and picks up the freight, correct?
A. Yes.
Q. I'd like to move on to the actual way that you got the

rate for this shipment. There's been a lot of testimony about how the rate came about to be. I apologize, but I do need to go over this in excruciating detail because of the nature of this. When you first got the call from Mr. Mullen, you were told to get the rate and then you went on to your computer, correct?
A. Yes.
Q. And you used a Class 100 because you thought that was the right class?
A. Yes.
Q. And you punched it into your computer, you got the rates for Central Transport?
A. Yes, I did.
Q. You called up Mr. Mullen, you said I have a rate, it's what, $900?
A. $900 and some change, yes.

Q. He said you can do better, something like that?
A. Yes.
Q. So you called?
A. See if I can try to do better.
Q. What did you say to him?
A. I said I will try.
Q. So you called Mr. Horetsky?
A. Yes.
Q. He's the local person for Central, is that correct?

A. Yes.
Q. And what specifically did you say to him?
A. I just asked him if we could try and get spot quote on a skid coming out of California. It was a new customer for us, I was trying to work out a rate for them.
Q. And did he have to call you back or did he give you a rate right there?
A. He didn't give me the rate. I got the rate.
Q. You asked for a spot quote from Mr. Horetsky?
A. Yes.

Q. Did he give you a spot quote rate?

A. No.

Q. He had to call you back?

A. No.

Q. Okay. What did he say when you said I'd like a spot quote rate?

A. We talked for a minute or two, he just basically said I told him the rate I was getting, he said to drop a class to 50.

Q. He didn't have to call you back?

A. No.

Q. And you never told him that was Class 100, did you?

A. Yes.

Q. Now, in your testimony earlier in your deposition, you usually prefaced what George says with the word basically, basically he said drop it down to Class 50. Basically this is

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what happened. What I'm interested in informing the jury of is exactly the words that came out of Mr. Horetsky's mouth and your mouth during that telephone call. So with respect to the telephone call that you placed to Mr. Horetsky with respect to getting a lower rate, what words came out of your mouth into the telephone?

A. I'm going to be honest with you, I can't exactly tell you how it came out. It came out that I have this rate, can he do something better on this rate here.

Q. How many times over the course of a week were you asking for rates for customers?

A. A lot, 100 to 150. You're asking if I'm calling people to get rates, I'm giving rates?

Q. I'm trying to figure out how busy you are with respect to getting or giving rates, either one?

A. One hundred to 150.

Q. The timeframe for 100 to 150?

A. You said a week.

Q. A week, okay. Between now and then you would have given thousands and thousands or hundreds and hundreds of, maybe thousands of quotes and asked for quotes, correct?

A. Between now and then?

Q. Between now and then, yeah?

A. No.

Q. Between today and when you got this quote, let me ask

you -- did you leave Logistics Plus right after the quote?
A. Six months after.
Q. Okay.
A. Five or six months after. Right around that area.
Q. In these five or six months, were you getting an giving quotes?
A. Yes.
Q. Hundreds?
A. Hundreds.
Q. Is part of the reason it's tough to remember one single quote is because you're really, you're dealing with hundreds of these things, is that fair to say?
A. To remember it, yes.
Q. I'm asking with regards to actual words that's what you said, you said I can't really remember, correct?
A. I don't remember word by word, but I remember what the conversation was about.
Q. Now, you said during your testimony on direct with respect to the suggestion that you are the one who asked for a Class 50 rate, you said we can't do that kind of thing, we just

don't do that, is that what you said?
A. No.
Q. What did you say?
A. On what part?
Q. I'll ask the question again. During your direct

testimony you testified?
A. Direct testimony, you mean today, sir?
Q. I'm sorry. During the questioning by Mr. Knox?
A. Okay.
Q. Actually no, I'm sorry, it was counsel for Accu-Spec.
THE COURT: Whoever it was, he was asked an earlier question, say what it was and then ask him whatever you want.
MR. COHEN: Thank you.
BY MR. COHEN:
Q. The question was did you know that Mr. Horetsky testified or testified that you're the one who suggested the Class 50. And you testified, this is where you correct me if I'm wrong, I don't do that, we just don't do that, did you say that?
A. I don't know if I said it like that. What was your

question?

Q. The question is what did you say with respect to the issue of you lowering the classification?

A. I was told to lower the class.

Q. With respect to your practice of dealing with getting rates and giving rates, you testified that you just don't do that, is that correct?

A. I don't do what?

Q. You don't knock down the class to get a better rate.

THE COURT: This is going nowhere, through no fault of yours and I think through no fault of his.

BY MR. COHEN:

Q. Another way of coming at this, rather than going through that particular valley, that would be good but we're not going to get to the end of it.

A. Your Honor, I could literally explain, if it's a Class 100, I will not make a decision to change to Class 50, is that basically what you're asking?

Q. Yeah, that's what I'm asking?

A. I will on my terms change it. The reason is the pricing. If it ends up getting into a Class 100, gets charged for it, the quote is still getting paid at Class 50. No one in the company will change it, has no right to change it on their own.
Q. Right after that you testified that classes are brought down and that's just how the business works?
A. Yes.
Q. So you're saying on one hand you won't do that but that's how the business works, which way is it, does your company agree on misclassifying freight on bills of lading?
A. We do what we're told to do. We get the job done. So does Central, so does Holland, so does all the trucking companies. You get it taken care of.
Q. In this case the bill of lading you prepared was a Class 50 on there, you knew it was Class 100, correct?
A. Yes.
Q. Is that how you got the job done?

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A. Yes.
Q. Let me show you another exhibit. I direct your attention

to CT-6, it's in your book. I believe that was presented to you earlier. This is the invoice effectively from Logistics Plus to Accu-Spec, correct?
A. I don't think it's an invoice, it's a quote, yes.
Q. This says "quotes are based on information given at time of quote. If variables such as dimensions, class and/or weight change, this quote will no longer be valid." Do you see that?
A. Absolutely.
Q. When asked about this document, you said today in earlier questioning that's on there because if there's bad info, the deals null and void, if there's a high quote, nothing is valid?
MR. KNOX: I think that's a mischaracterization of the testimony, I don't think he used the words null and void.
THE COURT: What the testimony is, if they think the predicate for the question is inaccurate, they can, that's what they think of it. If they think it's accurate, the objection is overruled. Start that again.
MR. COHEN: Thank you, your Honor.
BY MR. COHEN:
Q. During early questioning and testimony with respect to this document, you testified that the reason that language is

on the quote is because if there is bad information provided, then the quote is null and void. And if the shipper gives you

bad information, the quote is not valid, is that summary accurate?
A. Yes.
Q. Did you ever during the course of this transportation, open the National Motor Freight Classification and actually try to get the actual rate, the actual class?
A. No, I didn't.
Q. I'd like you to look at a document which is marked Exhibit, I believe 13. All right, we've looked at this a moment ago, we were reading the text off the top of this one. This is the bill of lading you prepared for the transportation of the X-ray machine after it was fixed, right?
A. No.
Q. Was it on the way to being fixed?
A. It was on the way to get crated for return to get fixed.
Q. On this bill of lading under description, you write "X-ray machine." And the class or rate is now 92.5?

A. Yes.

Q. I take it you put X-ray machine on there this time around because you knew it was an X-ray machine?

A. Yes.

Q. And where did you get the 92.5?

A. I don't know.

Q. Wild guess, anything, you have no idea?

A. I don't know why, might even be a misprint, I don't know

why.

Q. I'd like you to look at Exhibit CT-12 for a second. CT-12 is also a Logistics Plus bill of lading, is that correct?

A. It's an invoice.

Q. I apologize, you're right, it is an invoice. This invoice lists X-ray machine value $120,000?

A. Okay.

Q. Did you prepare this?

A. No.

Q. Now, you realize your father-in-law testified that he never told you to get the cheapest rates?

A. I wasn't here yesterday, if that's what was said, okay.

Q. Was he wrong?

A. Yes.

Q. Why do you think he testified that way?

MR. KNOX: Objection.

THE COURT: Sustained.

MR. COHEN: I'm very close to being finished with this witness, may I have one moment to examine my notes. I'd like to move the introduction of Exhibit 13.

THE COURT: It's admitted.

THE COURT: CT-13?

MR. COHEN: Yes, your Honor, thank you. I have no further questions for this witness.

THE COURT: Anything else of this witness?

MR. KNOX: Just very quickly one question.

REDIRECT EXAMINATION

BY MR. KNOX:

Q. Real quickly, the Class 50 rating that was placed on the bill of lading, did Mr. Horetsky okay that fact that was going to be put on the bill of lading?

A. Yes.

MR. KNOX: Thank you.

MR. DELANEY: Nothing here, your Honor.

MR. COHEN: One more, your Honor.

RECROSS-EXAMINATION

BY MR. COHEN:

Q. Mr. Horetsky gave you a quote for a Class 50 crate, he didn't okay transportation of a Class 100 item at Class 50, correct?

A. He didn't give me a quote. You keep saying a quote, a quote is the numbers of the price. He never gave me a price. We just talked about lowering it to 50, that's what I did off of my database. There was no quotes between me and George.

Q. He didn't authorize a Class 50 rate for a Class 100 product?

A. Yes, he did.

MR. COHEN: Okay.

THE COURT: Now, you're excused. Do you have any other witnesses?

MR. KNOX: Judge, I'd like to call Mr. Jim Berlin to the stand.

THE COURT: Before we start with the witness, let me see you at side bar briefly.

(At side bar on the record.)

THE COURT: Just by away of streamlining this, this jury is about ready to fall over on their chairs. Give me an offer of proof on this guy, what is he going to cover that hasn't been covered?

MR. KNOX: He has background, obviously, this is his company, he's CEO. He's going to talk about the inspection, the damage.

THE COURT: I'm not saying you can put him on. It's not up to me to say that without objection, unless there is an objection, what is he going to say that materially advances the ball and tells the jury something they haven't already heard from your perspective?

MR. KNOX: Mr. Fanzini did cover a lot of ground to some extent, but off the top of my head --

THE COURT: As you go through the testimony, be sensitive to duplication, all right.

MR. KNOX: All right.

(End of discussion at side bar.)

THE COURT: Go ahead, Mr. Knox.

MR. KNOX: Thank you, your Honor.

JAMES BERLIN, LOGISTICS PLUS WITNESS, SWORN

DIRECT EXAMINATION

BY MR. KNOX:

Q. Good morning, Mr. Berlin.

A. Good morning.

Q. You had indicated to me you have a tough voice. If I could, again, what I told Mr. Fanzini, keep your voice up and slow down for the court reporter's and jury's sake.

A. I have my dad's voice and I'm from New York City, I have two strikes.

Q. Mr. Berlin, the judge is the jury's best friend here, we'd like for you to streamline this, Mr. Fanzini covered a lot of ground, so I don't want to duplicate too much with you. But I do want to touch on a few key points. Before I get to that, I'd just like to have you identify who you are and a little bit

about your background. What is your full name?
A. James Richard Berlin.
Q. And where do you live?
A. In Erie.
Q. Are you affiliated with Logistics Plus?
A. I'm the CEO, yes.
Q. At Logistics Plus?
A. At Logistics Plus company, based in Union Station.
Q. What does that company do?
A. We move freight around the world for different customers.

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Q. And do you have a background, prior to starting with Logistics Plus, in the shipping and freight industry?
A. I do. This is what I do, I started out as a kid working the dock. I drove a truck for 10 years or so. I got asked by one of my bosses about becoming a dispatcher. Then I became the supervisor terminal manager. And about 10 years ago I started Logistics Plus.
Q. How many employees back in 2003 did Logistics Plus have?
A. Maybe 60 or 70 back then or close to it, right.

Q. How many do you have today?
A. About 110.
Q. Mr. Berlin, are you familiar with a company called Accu-Spec?
A. Yes, I am.
Q. Are you familiar with the specific transaction that was at issue in this case?
A. I am now, yes.
Q. How did you become familiar with this transaction?
A. I don't remember exactly, some notification of a claim not being paid.
Q. Did you have any role in preparing the bill of lading?
A. No.
Q. Did you have any role in talking with Central Transport?
A. No, not until later.
Q. When did you first have contact with anybody from Central Transport regarding this claim?

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A. I don't remember exactly, I think it was around the holidays of that year. Around Christmas time, I don't remember exactly.

Q. What was the nature of your contact?

A. Well, they said there was some damage that happened to this crate that that was transported, I tried to help Chris out by calling the higher ups --

THE COURT: Chris who?

THE WITNESS: Chris Fanzini, I'm sorry. And one of the higher ups in Central that I know. I called him up, e-mailed him, said we need to get this thing paid.

THE COURT: You're talking too fast.

THE WITNESS: That we need to get this thing paid.

BY MR. KNOX:

Q. When you say the higher ups, are you referring to Central Transport?

A. Yes.

Q. Do you remember specifically who you were dealing with?

A. I dealt with a gentleman by the name of Jim Rafferty.

Q. What was the nature of your communication with Mr. Rafferty?

A. That it's clear that this project was damaged in transit in your car, and as always the carrier pays the claim. Now, there's issues how much he paid, I understand that. It's

always between the carrier and the shipper.

Q. Mr. Berlin, have you, as CEO of Logistics Plus, ever had to confront a claim like this in the past few years?

A. Never in my life.

Q. Mr. Berlin, what is your understanding of Central Transport's reason for denying this claim prior to litigation?

A. I think Accu-Spec was requesting the full $120,000 value of it. And that seemed to be exorbitant. When you get a claim, you try to mitigate it, you try to make it less expensive than the total. You do what you can to fix it, reduce the cost of it. They were trying to get Accu-Spec to agree, you know, not to 120, it was something less than. That was the only issue.

Q. Do you see the document that I have up on the screen, CT-0008?

A. Yes, I see that.

Q. Have you seen that document before?

A. Yes, I have.

Q. After seeing that document, what was your understanding of why Central Transport was denying this claim?
A. That they had clear receipt, delivery receipt.
THE COURT: Keep your voice up.
THE WITNESS: They had clear delivery receipt.
BY MR. KNOX:
Q. Any other reason, does that second paragraph talk about

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anything else?
A. Just no notification of any discrepancy at time of delivery, no record of any discrepancy with the shipment while in our possession.
Q. Based on your experience in the shipping and freighting industry, does that type of reasoning for denial of a claim, does that end the story in your mind?
A. No.
Q. Why not?
A. There's more to it. In this case Jim signed it, even though the damage is there, it was remiss on Jim's part, he really should hold the driver there, wait a minute, there is a

crack here, there is a crack there, don't go anywhere until we find out the extent of the damage. Sometimes that does happen. They quickly called up and let Chris Fanzini know that there was damage. And George Horetsky went down there. So it would be similar to if there is a receipt that says the crate is damaged. But they didn't.

Q. But the fact is that they didn't, does that cause a big problem in your mind?

A. No, it remains similar, has nothing to do with this story.

Q. Mr. Berlin, to accommodate your time, let me jump around --

THE COURT: Don't apologize, just go right to the

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question.

BY MR. KNOX:

Q. Mr. Berlin, Mr. Carlson said something interesting the other day in testifying, he said that pricing didn't matter to him. Were you present in the courtroom when he said that?

A. Yes, I was.

Q. Have you had any conversations with Mr. Carlson about pricing and using Logistics Plus?
A. No, never.
Q. He said pricing doesn't matter, what is your thought?
A. Well, I kind of laughed. As a business owner he knows that pricing always matters.
Q. And particularly with regard to Logistics Plus, does Logistics Plus serve a role in terms of getting good prices for customers?
A. Yes, the company can call Central or anyone else, then get the rate for this shipment. Generally indicates like this, they call us, we do more business so we can get a better rate for them. That's why they involve us in that.
Q. Mr. Berlin, did you have an opportunity to view some of the photographs of the damage to the crate in this case?
A. Yes, I did.
Q. In fact, the one picture that I have up there on the screen, I believe that's Exhibit 9, have you seen that picture?
A. Yes.

Q. In looking at the photographs regarding the damage to the freight and damage to the crate here -- strike that, let me back up. Based on your experience, have you had occasion to view damaged freight as a truck driver in any other capacity?
A. Yes, many times.
Q. In fact, have you in fact damaged freight through your career?
A. Not many times, but yes.
Q. How have you damaged freight in the past?
A. Things drop or a fork goes into the skid in front. Lot of handling moving around the world.
Q. Have you had any experience in packing freight?
A. Yes, I have.
Q. What is the nature of your experience in packing freight?
A. Well, when I was a trucker, we used to pack things occasionally. Most recently, we started a warehouse in Erie a couple years ago, and as Mr. Carlson, when things get crazy I put on my blue jeans and go to work.
THE COURT: Slow down, I've got to ask you, I'm not trying to harp on you, it's for your mutual benefit, he has to get everything down. You're like at the end of the Indianapolis 500, you're getting around that last turn, slow

down. Go ahead.

BY MR. KNOX:

Q. Mr. Berlin, based on your experience as a truck driver, a

forklift driver, experience in packing firsthand, experience with damaged freight, did you reach an opinion based on your review of the photographs and the evidence in this case, as to what might have happened here?

A. Yeah, it looks like rough handling. As somebody testified, just in a truck there's lots of bouncing, I saw films of this. It bounces and on turns the freight moves a little bit. And that's one thing that impacts the fragility of the freight or the safety of the freight. The other thing is handling, picking it up, moving it. When these things go from California to, I don't know how many, George would know better, three, four, five terminals, that's a long way. Pulls in, gets pulled off one truck put on another truck. It's put on one truck, put another truck. So there is handling to it. And the freight has to be protected against normal bounces of the trunks and equipment, stones, things like that. As well as the operator that moves the freight usually protects it against that. In fact, I can tell you the warehouse we were at, there's like a foam machine, it's a couple barrels, has two handles coming out, you spray that foam, it's liquid foam. All of a sudden it just fills up around the thing, put it on the top of it, you seal it. And you've got like a styrofoam protection where molds, like the thing molds itself, whatever is in there. That's common, we do that a lot in the warehouse.

Q. If that type of foam packing was used here, Mr. Berlin,

would that have changed anything in this case?

A. Yeah, you can drop it and probably not hurt it. I think this wasn't dropped --

THE COURT: I didn't hear what you said, tell me again what you just said?

THE WITNESS: I said I don't think this thing, doesn't seem like this tipped over, the tip and tell would have shown it was tipped over. But it could have been bumped and dropped and hit. And the foam would have stopped it from moving anywhere. It takes up all the empty space in the

container so there's no place for the freight inside that
container to move.
BY MR. KNOX:
Q. Mr. Berlin, I believe you're aware of that discrepancy between Mr. Fanzini and Mr. Horetsky?
A. Yes.
Q. About what they said happened here in this conversation?
A. Yes.
Q. I believe Mr. Horetsky said Central Transport never changes the class of an item, did you hear him say that?
A. Yes.
Q. Based on your experience, do carriers in fact change the class, for whatever reason, in setting up transactions?
MR. COHEN: Objection, your Honor.
THE COURT: What's the nature of the objection?

MR. COHEN: This is hearsay, doesn't speak to the issue in the case.
THE COURT: He said based on his experience does Central Transport do it, is that the question.

MR. KNOX: If that's what -- I can't remember, I'll reask the question.

BY MR. KNOX:

Q. Based on your experience in dealing with various carriers, Mr. Berlin, have you ever seen an instance where carriers have in fact changed the class of an item?

THE COURT: Sustained, it's irrelevant.

BY MR. KNOX:

Q. Mr. Berlin, Attorney Cohen asked Mr. Fanzini about this tariff, I believe Mr. Fanzini said he didn't -- any tariff. Do you know whether your employees routinely explain all the terms of the tariff documents to customers that are shipping?

A. It's funny. It's there, I've seen it now in writing, I've been in trucking for 30 years, never read the fine print before. I think that's more for the lawyers. The employees aren't told to read -- the customers are not. It's just something lawyers look at in a case like this to point it out.

Q. Do you know how many pages are in this tariff?

A. Hundreds for each carrier. There's dozens, if not hundreds of trucking companies, they all have this. There are books three inches thick. They may have slightly different verbiage, basically, it's the same thing. Everyone has their own.

Q. Mr. Berlin, Central Transport has raised an issue here the X-ray machine is perhaps used versus new. Have you heard all the testimony in this case, including the testimony of the Dage employee, Mr. Fisher?

A. Yes, I have.

Q. Based on your entire understanding of this freight, do you have an opinion as to whether or not this X-ray machine is new or used?

MR. COHEN: Objection, your Honor, there's absolutely no foundation for this witness to know whether this machine is new or used. He is the Logistics Plus president. His opinion would be completely without basis.

THE COURT: It's overruled.

BY MR. KNOX:

Q. Mr. Berlin, do you deal with new versus used in shipments?

A. Yes.

Q. Knowing what you know about this item, the facts of this case, do you have an opinion as to whether this is new or used?
A. I think I did some quick math after I got out of here when I heard the testimony, it had I think 20 hours of use on it, and it does 600 hours a year for decades. Even two decades, 20 years, 12,000 hours. This machine's life is a

minimum of 12,000 hours, so 20 hours on it, which is .0016 percent of its life has been used. And I just bought a Volvo with 4,000 miles on it, I got a new car deal, new car warranty --
THE COURT: Excuse me, just answer the question.
THE WITNESS: I'm sorry.
BY MR. KNOX:
Q. Mr. Berlin, has Logistics Plus dealt with Accu-Spec before this transaction in the shipping business?
A. Yes, we have.
Q. Do you deal with Accu-Spec after the shipping of goods in this case?
A. Yes, we do.

Q. Does Logistics Plus deal with Accu-Spec in shipping other goods after Logistics Plus was sued?

A. Yes, we do.

Q. Mr. Berlin, I'm showing you three documents, very quickly --

MR. COHEN: Your Honor, can we see the court at side bar for a moment?

THE COURT: All right. Take the exhibit off the screen.

(At side bar on the record.)

MR. COHEN: I object to the exhibit, never seen it, totally new.

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THE COURT: Let me see it. What is it?

MR. KNOX: An invoice from Accu-Spec. Bill of lading from Accu-Spec.

THE COURT: What is the relevance, what does it have to do with this case?

MR. KNOX: Just a description of a generic item used in this case. Obviously, be an issue --

THE COURT: Sustained.

(End of discussion at side bar.)

BY MR. KNOX:

Q. Mr. Berlin, if Mr. Mullen had told Mr. Fanzini that what was being shipped here was an X-ray machine, moreover a $120,000 X-ray machine, would Logistics Plus have done anything differently here?

A. Yes.

Q. What would they have done here?

A. There are many other ways to move freight. If you want to move it the cheapest way, you do one thing. If you want to move it the most careful way, you do another thing.

Q. What would be the most careful way to move freight?

A. In that case what we do is instead of putting it on a company like Central Transport -- where it's in a truck with a lot of other freight, and it's moved around from terminal to terminal as it makes its way across the country. The safest way is to get what they call a dedicated truck. Maybe a

14-foot van, like a laundry truck you might see on the road or a straight truck. You put it in that truck and the guy closes the door and never gets touched again until the same driver delivers it. That's like $3,000, close to $3,000 to $4,000 would be normal for that.

MR. KNOX: Thank you, I have nothing further.

CROSS-EXAMINATION

BY MR. DELANEY:

Q. Mr. Berlin, my name is Patrick Delaney. As to your knowledge, that option was never given to Accu-Spec, is that correct?

A. Yes, that's correct.

Q. You mentioned that the first awareness you had of this claim was around the holidays of 2003?

A. I think so.

Q. By that point in time, were you aware that Accu-Spec had filed and amended claim with Central Transport reducing the amount of damages it was seeking?

A. I don't remember. I just don't remember.

Q. You called someone at Central Transport, is that right?

A. Called or e-mailed.

Q. But you corresponded with Central Transport?

A. Yes.

Q. Who was the person you corresponded with?

A. His name is Jim Rafferty.

Q. Do you know where he's located?

A. In Michigan, Warren, Michigan.

Q. And what did you say to Mr. Rafferty?

A. Basically, pay this claim.

Q. You felt the claim needed to be paid?

A. Yes.

Q. Okay. And that was because the goods were damaged in transit?

A. Yes.

Q. And what response did you get from Mr. Rafferty?

A. Well, if I remember right, he kind of followed up to tell some people locally get moving on this thing, it has to be resolved somehow.

Q. Did you hear anything more?

A. He also said Accu-Spec was being unreasonable because they wanted $120,000. We're not going to pay for value on something that might be mitigated.

Q. This is in the holiday season of 2003?
A. The best I can remember.
Q. Let me just show you what has previously been identified as CT-10, this is Central Transport's exhibit, and this is an amended claim loss, let me just make sure I got the sticker here, this is CT-10. Let me show you at the top, it has Central Transport loss and damage claim and it's dated 4/28/03; do you see that?

A. Yes, I do.
Q. And what was the amount of the claim at that point in time?
A. $37,752.40.
Q. We know now that this amended claim was even before the equipment was shipped to England. But in the holiday season at the end of 2003, am I correct Mr. Rafferty from Central Transport is still saying we're denying this claim because they want $120,000?
A. I know he said that, I'm not sure I remember the holiday, I'm not sure of the time. But that was the message, yeah, to

their claim.

Q. Did anyone from Central Transport ever contact you in an effort to investigate the details of this claim that was being made by Accu-Spec?

A. I don't think so.

Q. Did you ever talk to Mr. Cackowski?

A. No.

MR. DELANEY: That's all the questions I have, thank you.

CROSS-EXAMINATION

BY MR. COHEN:

Q. Good morning, Mr. Berlin.

A. Good morning.

Q. My name is Jeff Cohen, I'm the attorney that represents

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Central Transport. You've testified regarding the bill of lading which was used in this case, and you testified that even you as the president of the company didn't read it, is that true?

A. I never had read it.

Q. Sorry.

A. Yes, I never read it.

THE COURT: Sir, keep your voice up. Okay, go ahead.

BY MR. COHEN:

Q. Just to get this straight, this is a Logistics Plus document at CT-1, correct?

A. Yes.

Q. I guess if you're the president and haven't read this, you haven't told any one of your employees to read your own document?

A. Right.

Q. Makes things a little dangerous if you don't read your own documents --

A. It's a standard document.

Q. Isn't it a little dangerous to send out documents, contracts and agreements if you don't know what they say?

A. It's been around for a hundred years.

Q. You agree that the Central Transport tariff was incorporated into the terms of the transportation agreement, is

that fair so say?
A. I don't know I can say that.
Q. Did you hear Mr. Fanzini's testimony?
A. Yes.
Q. Did you see the exhibits on the screen there?
A. I did.
Q. Did you come to any different conclusion that the Central Transport tariff was not interrelated into your bill of lading that you drafted?
A. I don't know. I assume it's true, but I don't want to say it's true, but I don't know that.
Q. With regard to used articles on the commodities provision in the Central Transport tariff, it seems that it's somewhat easy to get additional coverage, all you have to do is charge 26 cents per each $100 or fraction thereof, declared by the shipper in excess of 10 cents per pound. By my calculation $312 would have covered that, is that true?
A. Yes.
Q. Wouldn't that be a reasonable thing for Chris Fanzini to tell Mr. Mullen?

A. No.

Q. It would not be reasonable for him, he shouldn't have told him that?

A. Nobody said it was used until two weeks ago.

Q. You testified regarding whether this X-ray machine was

new or used earlier. Have you ever worked for an X-ray manufacturer?

A. Never.

Q. Did you ever sell X-ray machines?

A. Never.

Q. Did you ever go to see a trade show with X-ray machines?

A No, not once.

Q. Have you ever gone to an X-ray machine manufacturer's showroom?

A. No.

Q. Did you hear Mr. Fisher testify about the X-ray machine?

A. I did.

Q. Did you hear him testify that it's a used demo machine?

A. I think you tripped him up when you said that.

Q. You think he was tripped up?

A. I do.

Q. You think he got confused and said the wrong thing?

A. I think you led him to say that.

MR. DELANEY: I'm going to object, I think the record reflects that counsel said used. The witness did not.

MR. COHEN: The record reflects the witness said it was a used demo machine.

THE COURT: You know the nice thing about having a jury in the box is they get to determine what the record reflects, not Mr. Delaney or Mr. Cohen. Overruled, go ahead.

BY MR. COHEN:

Q. You did hear there was a $15,000 discount between the new one and the demo?

A. I did.

MR. COHEN: Thank you, very much for your patience, sir.

THE COURT: Anything else of this witness?

MR. KNOX: Nothing further, judge.

MR. DELANEY: No, your Honor.

THE COURT: You're excused.

MR. KNOX: Those are all the witnesses for Logistics Plus.

THE COURT: All right. Members of the jury, we've got some cleaning up to do. I'm going to send you to lunch now, which means you're going to have a little bit longer lunch than normal. Try to back by 1 o'clock. You can step out, I'm going to stay on the bench here for a second.

(Whereupon, the Jury was dismissed from Courtroom C at 11:35 a.m.)

THE COURT: All right, we have some matters that we need to take up. But let's take about a five-minute recess, then I'll come out without the jury and address those things.

(Recess from 11:36 a.m.; until 11:41 a.m.)

MR. DELANEY: Your Honor, at this time we would respectfully request that the court grant a Rule 50 motion for

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judgment as a matter of law. This case is controlled by the Carmack Amendment, 49 U.S.C. Section 14706. That statute requires the plaintiff to demonstrate that it delivered cargo to a carrier, motor carrier, in good condition. That the cargo was returned or arrived at its destination in damaged condition. And that there were damages suffered by the shipper or the consumer of these services.

THE COURT: Are you asking, to be clear, are you asking for a declaration that a prima facie case has been established as a matter of law?

MR. DELANEY: I am. And that the affirmative defenses that the defendants carry the burden on, have not been proved.

THE COURT: Talk to me about those?

MR. DELANEY: Let's go back to the Carmack Amendment. It makes both the freight forwarder and the motor carrier responsible. And it has a section that talks about the allocation of damage between them. There's a stipulation that we entered into, even before the jury, even before opening statements, that Logistics Plus is the freight forwarder. So they are exposed to liability under the Carmack Amendment. We have Mr. Berlin acknowledging in his testimony this morning that he believes that the claims should be paid. He made that assertion to Central Transport. And when I asked him why he made that assertion, because he believed the goods were damaged

in transit.

THE COURT: Let me ask you this and I'm going to let the defendants speak for themselves, the bad packaging defense, that all things being equal, assuming it could be proved up, does Accu-Spec concede that is a legitimate defense on the Carmack Amendment?

MR. DELANEY: We acknowledge that a legitimate defense under the Carmack Amendment is damage by the shipper.

THE COURT: If the shipper was shipping crystal and/or wanted his crystal crated in an unprotected crate so that the crystal could roll freely, it strikes me that the motor carrier could not be responsible for that. That's really the defense that's been pressed here, why isn't that a jury issue?

MR. DELANEY: What you have here is uncontested testimony that we have a two-and-a-half ton piece of equipment that's constructed of steel and lead. And there is no way the packaging -- it's in the record, wooden packaging. The packaging itself could not have caused the damage that has been demonstrated in the photographs. We have lead and steel walls that have --

THE COURT: I'm denying that.

MR. DELANEY: If you're denying that aspect of it based on an admission by Mr. Berlin, then my motion still is that we have made out a prima facie case.

THE COURT: There are other issues I want to take up while you're there. Actually, by way of revisiting issues now that the evidence is in. The question of duty, new versus used.

MR. DELANEY: Yes. New versus used. Would trigger the limitation of liability contained in the tariff that Central Transport has. We determined that we are not, I believe the court's ruling is we are not a principal and that Logisitics Plus is not the agent, our agent for purposes of this transaction. I believe that agency relationship would be a necessary element to foist upon Accu-Spec any limitation of liability.

THE COURT: You mean on the theory you didn't have notice of it?

MR. DELANEY: That's right. In addition to that, the case law is very clear that the shipper has to have, must have been provided alternative rates so that there could be an intelligent decision to go with the limitation of liability. And there is no evidence in the record that the shipper was given such alternative rates.

THE COURT: Does Accu-Spec have a position, one way or the other, by way of follow-up to my previous in limine ruling, which I then withdrew in lieu of permitting record development as to whether or not this equipment, as the record stands, is new or used as a matter of law?

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MR. DELANEY: I do, your Honor. We would agree with Mr. Berlin's characterization of this. I think when we had the in limine discussion, we talked about in the colloquial sense of new versus used. Used the category that Central Transport has chosen to select in its tariff. It has not defined what used is. The confused testimony in this case is that this machine may have been put to use no more than 20 hours in a situation in which it is in the hands of the manufacturer being used, if you will. Only to demonstrate to potential customers how it functions. That doesn't constitute the kind of use one would think of colloquially since as being a used piece of equipment. In addition, Mr. Berlin got it correct in terms of percentage of useful life to which this product may have been put prior to the damage that it suffered in transport.

THE COURT: All right. Let's start with Mr. Cohen here first.

MR. COHEN: Your Honor, which particular issue would you like me to address first?

THE COURT: Come on up to the podium, I'll tell you where we'll start. Let's start with the first question here. Hasn't a prima facie case been made out as a matter of law; if not, why not?

MR. COHEN: Thank you, your Honor. With respect to a prima facie case under the Carmack Amendment, I really don't think anybody is going to dispute that it arrived in a damaged condition. It's just --

THE COURT: That's one of the requirements.

MR. COHEN: Contested really. The good -- origin is a different story.

THE COURT: I'm sorry.

MR. COHEN: The first requirement of the Carmack Amendment is the freight be delivered to the carrier in good condition. That's the element I'm addressing.

THE COURT: Did Central receive the cargo in good condition?

MR. COHEN: Correct. There is no testimony whatsoever from anybody who either packed the crate or loaded the crate on the truck. There is no testimony that there was anything but a signed bill of lading. Very same case, we have a signed delivery receipt. The plaintiff can't have it both ways. Circumstantial evidence to a certain degree can be used to establish that first element, your Honor. However, here we believe the circumstantial evidence is not enough. Certainly would provide us an opportunity to argue to the jury that the freight was not delivered in good condition.

THE COURT: And certainly you have the right to do so. If you were to argue that to the jury that when you got it, it already looked like it had been dropped off the Empire State building, what would you point to in the record, though, that would support a reasonable inference?

MR. COHEN: That when we got it, it was damaged?

THE COURT: Yes.

MR. COHEN: The purpose of a prima facie case is for the plaintiff to prove it was delivered in good condition. With respect to facts, we will argue to the jury, we would argue that the truck driver at the origin, you can see it in the crate. The damage to the outside of the crate -- the crate is big, he could have looked at it -- the truck driver could see one side is pushed out. The only other thing is a picture. So this box's damage was pretty noticeable inside, you can see it's crunched in there. It could have got on the truck in damaged condition, therefore, we believe a prima facie case has not been met, certainly as a matter of law.

THE COURT: At some point, I guess it depends on how I rule, but if I rule it goes forward, it just becomes a tactical decision as to whether you really want to argue to the jury it was damaged before you got it. But that would be a tactical decision.

MR. COHEN: It would not be my number one argument, an argument I believe we're entitled to.

THE COURT: I understand your point on that. Do I take it right that insofar as substantive affirmative defenses are, if you will, of the defendant's view, it is for one that it wasn't properly packed?

MR. COHEN: Yes, your Honor, that is one of the

defenses.

THE COURT: What else is there?

MR. COHEN: The other defense is Central Transport will relate to the limitation of liability.

THE COURT: Where, is that new versus used?

MR. COHEN: Yes.

THE COURT: What evidence on the record is there that Accu-Spec was ever given notice of this and had an opportunity to request a different rate, because I can't find none?

MR. COHEN: My understanding from the court's earlier ruling and from the evidence, all communication between Central Transport and Logistics Plus. Central Transport never communicated with Accu-Spec, of course.

THE COURT: Doesn't appear that way.

MR. COHEN: Except for the driver backing up. He backed up, dropped it off, that's it. With respect to the limitation of liability, here the limitation of liability would, we believe that Accu-Spec would be bound through the actions of Logistics Plus.

THE COURT: No, there's not, as a matter of law I already told you they're not their agent. How else could they be bound?

MR. COHEN: With respect to the limitation of liability, your Honor, the ruling is based on an agency

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issue --

THE COURT: I ruled on that already.

MR. COHEN: Then as to the limitation of liability, Logistics Plus would be bound by the limitation of liability and they, therefore, Accu-Spec would collect from Logisitics Plus, not from Central Transport. Central Transport would be responsible for $528, at 10 cents per pound. However, because the limitation of liability was an agreement the Central Transport entered into --

THE COURT: Too fast, Mr. Cohen, you're talking way too fast.

MR. COHEN: Because limitation of liability was part of the agreement that Central Transport entered into with Logistics Plus, Logisitics Plus and Central Transport, that agreement is set and bound. Recovery would be due to a failure of anything of a limitation of liability is squarely due to the failure of Logistics Plus to convey this information to Accu-Spec. They didn't even read their own bill of lading.

THE COURT: Is there anything you want to tell me by way of follow-up to Mr. Delaney's comments about used?

MR. COHEN: Yes, your Honor, I would like to. I would like to present that to the jury first, your Honor. With respect to --

THE COURT: You may not have a chance to present that to the jury, Mr. Cohen.

MR. COHEN: Yes.

THE COURT: I'm asking you now, how do you survive as a matter of law on the question of used?

MR. COHEN: As a matter of law, Mr. Fisher from Dage testified that this was a used demo machine. He testified that there was 20 hours of use, prior representation in the briefing was 12 hours. We're up to 20. There's 20 hours of use, the expected usage is 600 hours a year. Comes out to two weeks of use, I believe 50 hours a month is less than two weeks of use. That, most importantly, besides the actual manufacturer saying the words used.

THE COURT: That's irrelevant. It doesn't even define what used means. You know that.

MR. COHEN: Well, then, the other factor, I think it is important for the court to consider the fact there is $15,000 discount, again, between a new one and a demo model. You don't get a demo model, you don't get a new one for $15,000 less because it's used.

THE COURT: Is it accurate to say that it was

Central Transport's position here, through its own witness or witnesses, that the reason that the tariff appears and the reason it has the used language was inserted was to prevent what had apparently happened over the years, and that is that a carrier such as Central, were that shippers were trying to stick them with damage of old machines and so as a prophylactic

measure to protect themselves essentially to reimburse people for natural depreciation, wear and tear, they insert the word used. Now this machine, this shipper here wasn't trying to claim any damages that would have or old damage that would have been typical of an old X-ray machine, were they?

MR. COHEN: No. Your Honor, can I argue further?

THE COURT: Yes. You can tell me anything you want, but it strikes me that the use of the term used here, as you are attempting to use it, is at odds with the theory of the term as articulated by your own witnesses?

MR. COHEN: The language of the provision in its plain English is clear. We arguing is clear. And the application of that to the facts of this case is also clear.

That the machine was used as a demo machine that falls under the category of used, despite the partial reasoning that it was expressed for the inclusion of this item. The plain language is clear and could have, this whole situation could have been prevented if there was an additional payment made. So we believe the facts establish that the machine is used.

THE COURT: Are there any other defenses, besides the packaging defense and the one we just talked about, the limitation of liability, that is germane to our discussion?

MR. COHEN: Yes, that one other defense, your Honor, and that was with respect to the misclassification of the freight. In this case there is undisputed testimony that this

was Class 100 freight. Logistics Plus knew, well, Logistics Plus knew it and knowing that --

THE COURT: It looks everybody knew it?

MR. COHEN: I don't say no, not everybody. I would say that's for the jury. But with respect to the bill of lading. That was prepared by Logistics Plus, they wrote Class 50 on there, they knew it was Class 100. They provided a false contract, a false document. It was a material misrepresentation, or a fraudulent misrepresentation. Which would permit the voiding of the contract. And that in this case, Logistics Plus would be responsible for the full damage, Central Transport would be responsible for no damage.

THE COURT: All right. Before I swing to Mr. Knox, then let me ask Mr. Delaney and clear up a few loose ends, then we can get to Mr. Knox. First of all, with respect to the first prong that this is a prima facie case, he says you offered no evidence that this was in good condition when it left the shipper's control. In other words, when Central got it.

MR. DELANEY: Your Honor, I would refer the court to the Beta_Spawn_v._FFE_Transportation_Services, 250 F.3d 218, it's a Third Circuit, 2001 case.

THE COURT: What does it say?

MR. DELANEY: Bill of lading. That a clean bill of lading is not sufficient to establish the condition of goods if the goods are not visible or open to inspection. But the shipper may rely on other reliable evidence, direct or circumstantial, to establish the good condition of freight. Then in Footnote 8 the Third Circuit says, by the way, we're not saying that bill of lading isn't good enough if you sealed the crate. By the way we're not saying that a closed crate is a sealed crate. If it's not locked, banded or somehow wrapped in a fashion that prevents the shipper from looking at the goods. Now, I know they probably would argue in testimony we don't typically do that. But the Third Circuit in this case is saying look, the obligation is on the motor carrier to take that precaution. In addition, there was testimony by Mr. Horetsky if there is damage to the crate or the freight, that the trucker won't pick it up. We have a clean bill of lading. That we would suggest under these circumstances would demonstrate a prima facie case. In addition to that, we have the testimony of Mr. Fisher, who explained that there is a process for reporting damage if it occurs prior to the shipment going out. And that there was no such record, either verbal or written.

THE COURT: Assuming that it goes to the jury, assuming this jury were to conclude that Central Transport received it in good condition, Mr. Cohen. The next question logically would be, by way of a prima facie case as far as cargo damaged during the time it was in transit. There can't

be any doubt but that it was. So isn't it true that by your lights the only issue really for the jury relative to a prima facie case is when you got it, meaning Central, it was in good condition because it couldn't be damaged anyplace else other than in transit?

MR. COHEN: For the second element I think we determined they arrived in damaged condition.

THE COURT: Really in terms of a prima facie case, that is an issue, by your lights, that needs to be submitted to the jury, is that right?

MR. COHEN: Your Honor, with respect to prima facie, we believe two or three elements need to be submitted to the jury.

THE COURT: What are the other ones?

MR. COHEN: Damages.

THE COURT: You're quite right. Because there is a dispute on damages or there's not a dispute whether it was damaged, there's a dispute on the amount of damage, is that correct?

MR. COHEN: Your Honor, the dispute is foreseeability of damage.

THE COURT: I've ruled on foreseeability. Let me make this very clear. Let me just say this, this is off the point a little bit. This is a $46,000 case, $47,000 case. I'm now moving into my 12th year on this court, I've never seen a

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case like this. I do not say this, this is not accusatory toward anyone, any party or toward the lawyers, the lawyers fees alone in this case are far exceeding the value of the claim. I've never seen anything like this. I've never seen anything like it. Now, I got that off my chest. You do not dispute, do you, Mr. Cohen, by virtue of those photographs, exterior and interior, that the thing was damaged in some form or fashion during transit, assuming that the jury were to conclude that you got it in good condition, it was banged up, is there a dispute about that?

MR. COHEN: It was received in good condition and it arrived in damaged condition.

THE COURT: The real question here is the reasonableness of the damages. For instance, should they have shipped the thing all the way to England. Was it reasonable to have somebody come back here -- isn't that right?

MR. COHEN: We also would like to test the reasonableness of damages.

THE COURT: You're going to have a chance to do that. All right -- do you have a position on this misrepresentation?

MR. DELANEY: Yes. That, once again, because we are not the principal and Logistics is not the agent, our agent, if there was a misrepresentation, there was fraud, we wouldn't be bound by it, number one. If you remember the key testimony

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about misrepresentation from Central Transport's standpoint was that of Mr. Horetsky. I asked Mr. Horetsky if there was anything that would have prevented him from insisting upon information concerning the freight, that the character of freight itself. Now, you can't have justifiable reliance on a misrepresentation or on fraud. If the information is otherwise available to you. You can't sit back and say well, I've been duped, simply because you don't have the equipment.

THE COURT: Let me hear what Mr. Knox has to say. With respect to misrepresentation, are you making some kind of motion on that?

MR. DELANEY: I would, your Honor. To the extent that anyone is suggesting that Accu-Spec is bound by the misrepresentation or is bound by some fraud, I would make a Rule 50 motion as well.

THE COURT: All right. Go ahead, Mr. Knox.

MR. KNOX: Judge, if I could kind of go out of order and follow-up on that last point.

THE COURT: What's your position on misrepresentation, because they're accusing you of misrepresenting?

MR. KNOX: With respect to the argument that there was a fraudulent misrepresentation, that aspect of it I think is pretty easy. That issue really has never even been pled.

THE COURT: Yes, it has. The contention is that --

well, maybe I shouldn't say it has. It's in the points for charge that ask that --well, however it does or does not appear in the answer, if you will, I'm interested now on the merits based on what we've heard. They have a misrepresentation claim against Logistics?

MR. KNOX: I don't think he does. We obviously have a difference of opinion with respect to Mr. Horetsky v. Mr. Fanzini. And, again, in many ways it's a question -- when we talked about this in one of the pretrial conferences, it's a difference in price here. He's saying it voids the entire contract, they wouldn't have entered into it had they known it was Class 100. That's a misrepresentation, if you want to call it that. It doesn't really have any affect. Clearly, they would have entered into this contract, which was a Class 100 on the crate. There is no misrepresentation there.

THE COURT: Anything else you want to tell me quickly?

MR. KNOX: With respect to a prima facie case, I would join in Central Transport's argument on when we make mention in our oral argument, closing argument, I think your Honor is correct, that is a tactical decision that perhaps I'm not going to be allowed to draw my attention to. With respect to the defenses, our position, your Honor, as you know --

THE COURT: What is your defense?

MR. KNOX: Number one, we were not negligent. I

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think it's pretty clearly we proved that through the witnesses, who agreed with our position.

THE COURT: I'm not jumping out there insomuch as to the relevancy associated around in front of the jury under the Carmack Amendment prolonged this case for a day. You have to understand that you are barking up a completely irrelevant tree when you talk about your potential lack of negligence being tied in any form or fashion to the fact you never touched the goods. Of course, you never touched the goods. You're liable as a matter of law under the Carmack Amendment, so forget about this negligence thing. I'm not going to let you argue that.

MR. KNOX: That is a legal defense, your Honor. That we are allowed to prove we are not negligent in an act of the shipper. If we prove that, we don't pay.

THE COURT: You unfortunately are tied to the actions of the carrier. That's the way it works. The only way I see logistics beating the wrap, if you will, if you and Central can convince the jury that something that, for instance, goods were not in good condition when Central got them. But beyond that, what is the conduct at issue in the case insofar as you're concerned that focuses the light on your reasonable care, such that a jury would ever have to be interested in your negligence?

MR. KNOX: If the plaintiff meets its burden, which if I had to guess they probably will, I think meet their burden

on a prima facie case, the burden then shifts to us, we have to prove two things. Number one, that we're not negligent. And I am going to be very clear in my argument to the jury that if you think we're not negligent, that doesn't relieve us of reliability. We have to prove two things. But we do have to prove that we were not negligent. We have been arguing various things. Not touching the freight really is a big component.

The other aspect of that as the shipper is two fold. Number one, obviously, a packing defense. I think there is some, Mr. Cackowski testified with great authority and Mr. Berlin testified with great authority on that issue. With the act of the shipper here, Accu-Spec's theory is that they played a role, a factual role in causing this damage to occur by not telling us that this X-ray machine was worth $120,000. By not telling us it was an X-ray machine all. Everybody who has testified in our case has said that if we had known this, this whole thing would have been shipped entirely differently. We're conceding that point. They bear some blame on this point. Whether the jury believes that or not is obviously for the jury. That is our defense.

THE COURT: Just so the record is clear, Mr. Delaney made a motion on misrepresentation, are you making any motion on that?

MR. KNOX: I would make that motion as well, judge.

THE COURT: All right. Come on up, Mr. Cohen.

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MR. COHEN: Your Honor, I just want to point out one other thing. With respect to the shipper suggesting that they had no knowledge or should be held completely free of responsibility for knowledge of the shipping agreement, really, 49 U.S.C. Section 13701 requires that a shipper request a tariff. That's what that provision indicates. I want to make sure the court had that information.

THE COURT: Thank you. Let me get some orders on the record here.

ORDER

First, with respect to the Rule 50 motion, judgment as a matter of law. That's denied. That's the motion made by Accu-Spec. And the reason it's denied is twofold. One, with respect to that aspect of a prima facie case, there is in my opinion as least a colorable issue of fact, to wit, whether Central Transport received the cargo in good condition. If the jury were to find this as we set out in the jury form, if they were to answer that yes, they will not be required to also answer yes or no as to whether the cargo was damaged or during the time it was in transit. Because there's absolutely no evidence to the contrary. We would then get on to, as you'll see later, to the damage questions.

With respect to the revisited issue of new versus used. It is my opinion, now having heard the evidence, and it was my opinion when I ruled on the motion in limine, that this

piece of equipment as a matter of law is not used. And I based that opinion on two major factors. One is the testimony from the representative of Central, which explained the reason or reasons for the use of this tariff and the term used. And that was so that it would not get stuck with the shippers claiming that old equipment had been damaged in transit when it in fact the old equipment had the bumps and bangs that come along with being old. The comment was also made that old equipment, by the testimony to the effect that old equipment tends to damage or is more susceptible, can be more susceptible to damage in transit. That is the underlying theory or rationale on the term for restriction on limitation of liability as used equipment. As Central understands it. With that as background and the uncontradicted testimony here as to use, confirms what I believe pretrial, and that is use was so incredibly de minimus that it can't be used equipment within the meaning of the tariff. So that defense is eliminated.

With respect to the issue of misrepresentation. Several points. One, fraud, whether intentional or negligent has to be proved by clear and convincing evidence. That's the standard, has not even been close to having been met here insofar as the fraud claim is concerned. But more fundamentally as a substantive matter, the fraud claim hasn't been made out. And that is because from the testimony of Central's own witness, there was no testimony from which the

jury could conclude that a misrepresentation in fact was made. Central's witness never indicated that he was even informed that the Logistics person even knew what the equipment was, and the evidence suggests that essentially what happened here was there was no misrepresentation and the Central Transport's person -- relied on nothing, agreeing to classify and took a blind faith leap. Which then goes to the second prong of the fraud claim, which is justifiable reliance. There's absolutely no evidence of justifiable reliance here at all. Third, and somewhat off the point, but the uncontradicted evidence also establishes here that this equipment would be treated no differently if it was a 50 or if it was 100. And so the fraud defense is eliminated.

The only defense that I'm going to permit the defendants to go to the jury on is this question of packaging. Which in my view is a jury issue. On that point, though, bad packaging alone, which does not seem to be a matter of law within the case as is true of any defense of this nature. The jury is going to have to not only find that was packaged improperly, but that it was a causative factor in the machinery being damaged. In other words, by way of example, if the claim is that a piece of china was improperly packaged, but it was dropped off the Empire State building, all the proper packaging in the world wouldn't have prevented it from cracking when it hit. So they're also going to have to find it was a causative

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factor.

Now, what we do have you can start to read this over the lunch hour. We have the proposed jury charge, which I want you to review. We do have interrogatories to the jury, which we are going to change slightly, given what I said. But I want you to be reading these over the lunch hour. And then we may be a little bit late getting started with the jury. But at least we're going to get our charge pinned down. We'll get together around 1 o'clock then. All right.

MR. KNOX: Judge, if I could ask one question. One of our defenses, acts of the shipper, as indicated in terms of the conduct of Accu-Spec. I think that's pretty clear under the case law.

THE COURT: Tell me that again?

MR. KNOX: One of our defenses is, your Honor, as you know the acts of the shipper, which not only includes the packaging component, but the acts of Accu-Spec.

THE COURT: By not telling you what it was?

MR. KNOX: Clear --

THE COURT: Why isn't that a legitimate defense?

MR. DELANEY: Why didn't they ask us. There was no apparent attempt to deceive anyone, we told them it was equipment, they characterized themselves as the experts, and we are not a sophisticated shipper of equipment. I don't see how that is causative to the actual damage that occurred.

MR. KNOX: We're not saying it was fraud. We're experts in what, mind reading. They tell us it's one crate, it's a piece of equipment. We write it down verbatim on the bill of lading, this whole thing blows up. If they don't do that, we're not here. That is the key issue for us.

THE COURT: I've never seen two outfits run so rapidly relative to a small claim and yet throw thousands and thousands, somebody is responsible for this claim. Somebody. And it's mindboggling to me.

MR. KNOX: Your Honor, as an aside, if they just sued one of us, I think it would be a lot easier.

MR. DELANEY: Now it's our fault.

MR. KNOX: I didn't say that.

MR. DELANEY: Judge, if I could talk about the substance of what was just suggested. To repeat, we are not the experts. We hire these people, we don't withhold any information, that was their request. And we give them what information we have. Interestingly, Logistics own person classified it as a Class 100. That's an X-ray machine, if you remember the record.

THE COURT: How it would be shipped --

MR. DELANEY: Remember we had a discussion, he got the right class for the wrong reasons. So what are we talking about.

MR. KNOX: We're talking about an X-ray machine.

We're talking about value. If this is what this thing is, they should have told us.

THE COURT: If they told you it was an X-ray machine, your guy would have classed it as a 100, just like he classed it without knowing it was X-ray machine.

MR. KNOX: Twofold. $120,000 X-ray machine.

THE COURT: So what?

MR. KNOX: To the extent of the freight, our witnesses have testified very credibly they would have done things completely differently, put it on a dedicated truck, air freight, bubble wrapped, they should have moved it by itself.

MR. DELANEY: Class 100 is a large book in the National Motor Carrier Freight classification, Class 100, and an X-ray machine with no greater value than $30 per pound.

With this freight that would make it $150,000.

THE COURT: I'll think about this issue over the noon hour.

MR. KNOX: It's very important to us, your Honor.

THE COURT: I appreciate that. I know how important it is. One last word, Mr. Cohen.

MR. COHEN: Thank you, your Honor. With respect to the ruling regarding the argument about fraud, are you ruling Central Transport is not able to make that a motion that intentional material misrepresentation makes a contract voidable?

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THE COURT: Yes. Let me make it clear here. Well, because I didn't. There is no evidence, in my opinion, of intentional or negligent misrepresentation in this case at all. So I'm not going to let you make any argument about that.

MR. COHEN: With respect to a citation, for the record -- 49 U.S.C. 13710.

THE COURT: That is notice to shipper of the tariff.

MR. COHEN: With respect to the tariff, your

Honor --

THE COURT: That's now irrelevant, I've ruled as a matter of law it's not used equipment.

MR. COHEN: Respectfully, just for the record, thank you.

THE COURT: All right, we're in recess.

(Luncheon recess from 12:20 p.m.; until 1:18 p.m.)

THE COURT: Before we start talking about the proposed charge, I'm am going to include a charge on substantial factor in that. Because it strikes me that insofar as the inadequate packing defense is concerned, it's not enough they find it was improper, really the term should be, it says inadequate, we're going to change it to improperly. If you find it was improperly packaged, then you will have to find that the improper packaging was a substantial factor in producing the damage. That having been said, we'll just go around the table. Let's first go to Mr. Delaney on the charge?

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MR. DELANEY: Your Honor, on the charge I have no comment.

THE COURT: Which is another way of saying you have no objection?

MR. DELANEY: No objections.

THE COURT: Let's go to Mr. Knox, then we'll swing over to Mr. Cohen.

MR. KNOX: Judge, very briefly, on page 3, last full paragraph, it says Central Transport, or the freight forwarder, Logistics Plus, must avoid individual liability for damages -- if they can prove --

THE COURT: The shipper caused the damage. In other words, you think that should be, not to put words in your mouth, but made more case specific. In other words, only if they can prove that the shipper inadequately packaged the equipment and that the inadequate packaging was a substantial factor in causing the damage, is that what you're saying?

MR. KNOX: Well, two things. The case law, the Third Circuit and elsewhere, is very clear. Again, our defense is a two-prong defense. We have to show that we were not negligent. And that the shipper caused the damage. I think the shipper caused damage is actually fine.

THE COURT: All right. In other words, the shipper caused the damage is just another way of saying shipper didn't package the material, right?

MR. KNOX: Again, your Honor, it's going to be one of our main arguments, the act of the shipper here, Accu-Spec, and their failure to tell us this was --

THE COURT: I see no evidence at all of record -- I wanted to take this up with you one more time. You're saying this, if Accu-Spec told you that it was X-ray equipment, rather than just 5,020 pounds of equipment, right, if they would have told you that it was X-ray equipment, which they didn't --

MR. KNOX: If they would have told us it was $120,000 X-ray equipment.

THE COURT: All right. That it is more likely than not that the damage would not have occurred, is that how it goes?

MR. KNOX: Correct.

THE COURT: If the evidence suggests and it does without really any contradiction that I can see, if the appropriate classification was 100 for this, regardless of its value, are you saying it wasn't 100?

MR. KNOX: You just don't need 100, you need to know that it's 100 and $120,000 and an X-ray machine. All of that together puts us on notice that hey, whoa, we need to do something differently here.

THE COURT: What would have been done differently here or what does the evidence suggest would have been done differently, which would have produced, from which a jury could

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find, without speculating, that the machine would not have been damaged?

MR. KNOX: Two things, the testimony of Chris Fanzini and Jim Berlin, the guys with the most experience here in driving trucks, driving forklifts, saying this absolutely should have gone on a dedicated truck, air lifted with bubble wrap, separate and apart from all the other freight, it's exceptional freight. They both say that. I think it's up to the jury to determine whether or not that plays a serious role here. It's our contention that it did. We wouldn't be here if they had told us that this is a $120,000 machine.

THE COURT: You weren't with the bubble wrapper anyways?

MR. KNOX: We would not have called Central Transport to send this on a normal truck. We wouldn't have been involved with bubble wrapping, yes, you're right. Our services are to arrange the proper transportation.

THE COURT: Mr. Delaney, what do you have to say about this?

MR. DELANEY: This business about knowing it was $120,000, the evidence demonstrates from the exhibits, the National Motor Freight Classification book, that a Class 100 is not only an X-ray machine, but it's an X-ray machine of a particular value, $30 per pound. That would put this machine at $150,000. And that's the class that Mr. Fanzini came up

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with. So this is simply, I believe, a specious argument to try to avoid liability. We didn't misrepresent to anyone. We didn't cause the damage by misclassification. They could have handled it as an X-ray machine Class 100. And we heard the truck drivers and we heard Mr. Horetsky say Class 100 or Class 50, we don't handle it any differently. So I don't know how there's a causal relationship between our absence of telling them it's an X-ray machine at $120,000, and the physical crush that occurred to this particular machine.

MR. KNOX: Just because something is Class 100 doesn't mean it goes on a dedicated truck or another truck. You have to have both factors involved. You need to know the full picture. They didn't give us the full picture here. Without a doubt if they tell us that, we're not here. I don't think it could be any clearer.

THE COURT: Well, it could be a lot clearer. I mean --

MR. DELANEY: We're not, I'm sorry, judge -- we're not the experts. We don't ship this sort of thing, we hire the experts, and they ask us for information, we give it. There is no evidence that we --

THE COURT: Here's the other thing, this doesn't really run at all to the merits of the argument, one way or the other, it's to the viability of the position. But you have an indemnity claim over as against Central anyways, don't you?

MR. KNOX: Yes. But we don't even need to go there, your Honor, if we're not held liable. In conversations with Attorney Cohen throughout this litigation, I fully anticipate them to appeal this case if they lose.

THE COURT: I would think they would take this case to the U.S. Supreme Court.

MR. KNOX: We're along for the ride for another year and a half on this thing. This is crazy. I guess I would just respectfully ask your Honor, that clearly is a proper issue for the jury. I mentioned it in my opening. I don't know why --

MR. DELANEY: Your Honor, I don't know of any case law that suggests this kind of argument. If counsel is aware of any case law under the Carmack Amendment that the interaction between the freight forwarder and the shipper, in terms of information that passes back and forth, can be called a cause of the damage, I'd like to hear about it.

MR. KNOX: There is very little case law on freight forwarder litigation at all, on a number of issues in this case. It's clearly an act of the shipper.

THE COURT: Look it, my ruling on it is this. There's been testimony that the thing was originally classified as 100, based upon the equipment and I think the weight or size or something like that. That was apparently sufficient. Number two, the uncontradicted testimony in this case is equipment would be handled the same, whether it's at 100 or

it's at 50. With all respect, you've already testified. Number three, in my opinion, as between the shipper and a freight forwarder, the freight forwarder can't shift the duty to the shipper to ferret out all the details. If they feel that they don't have enough, they can inquire. And, number four, the fourth reason why I'm not letting it come in is on the issue of damages, because as to whether or not it would have changed anything, it is entirely and completely speculative. So that's my ruling on that. Beyond that, is there anything else in the charge, Mr. Knox, that you want to call to my attention?

MR. KNOX: So that I just don't get lost -- my initial comment was that the language from the Third Circuit and other case law --

THE COURT: I can't hear you, neither can he.

MR. KNOX: Just as to my first point that the language in the case law that they were not negligent, have that precede the words that the shipper caused the damage. Issuing that two-prong factor I think needs to be spelled out.

THE COURT: I'm going to get off this, but this falls under the category of looking a gift horse in the mouth. I'm not sure there's any evidence that Logistics was negligent, what evidence is there?

MR. KNOX: Exactly.

MR. DELANEY: If I may speak to that. He's correct,

the case law puts the burden, it doesn't require the shipper to show negligence. But it does require the freight forwarder and the motor carrier to show the absence of negligence.

THE COURT: All right.

MR. DELANEY: And that the damage was caused --

THE COURT: Tell me one more time what words should be inserted there, by your view?

MR. KNOX: Before damages, as if they can prove, number one, they were not negligent. And, number two, that the shipper caused the damage.

THE COURT: All right. Anybody have a problem with that as a statement of law?

MR. COHEN: Your Honor, if I may.

THE COURT: You may, but first tell me do you have a problem with that change.

MR. COHEN: Yes.

THE COURT: All right, come on up.

MR. COHEN: I believe that Central Transport's position is that the language in that sentence should read --

THE COURT: In other words, is that the sentence we're beginning with?

MR. COHEN: Actually, starting on the second, paragraph that starts, one, Accu-spec, read that along to make it clear. Once Accu-Spec, the shipper, establishes that the equipment was given to Central Transport --

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THE COURT: Mr. Cohen, you're going just too fast.

MR. COHEN: I understand. I'll slow down, I apologize. Once Accu-Spec, the shipper, establishes that the equipment was given to Central Transport in good condition, returned from Central Transport in damaged condition, and the amount of money damages which Accu-Spec incurred, only means by which the motor carrier, Central Transport, or the freight forwarder, Logistics Plus, can avoid liability or damages is if they can prove -- if they can prove that the packaging was a cause of the damage.

THE COURT: That's an incorrect statement of the law. It would be, and I'm going to change it partially consistent with what you said. If they can prove -- this is how it's going to be. That the manner in which the X-ray equipment was packaged -- what was the word I used before -- the manner in which the X-ray machine was packaged was improper and that the packaging was a substantial factor in causing the damage. What else?

MR. COHEN: Your Honor, with respect to the second to last paragraph, where it reads in this case you have heard evidence, you have heard reference to the bill of lading, the bill of lading is a document used in the shipping industry. It is an acknowledgment by a motor carrier that it has received certain goods. And it is effectively a contract for transportation of those goods. I don't know that is necessary to be included at all. Because right now, through your prior rulings, the bill of lading is pretty much out of the case.

THE COURT: Insofar as it relates to the tariff?

MR. COHEN: And I believe that we moved to have this removed.

THE COURT: Does anybody have any objection to me removing the verbiage about the bill of lading, does it add anything, Mr. Delaney?

MR. DELANEY: I didn't catch up with you, your Honor.

THE COURT: Bottom of page three, top of page four.

MR. DELANEY: I don't have any objection to removing that.

THE COURT: How about you, Mr. Knox -- my view is the less the jury hears in a short amount of time the better, as long as it's accurate?

MR. KNOX: So you're suggesting taking that out, your Honor?

THE COURT: Yes. The discussion about the bill of lading.

MR. KNOX: I don't think I have a problem with that.

THE COURT: We'll take it out. What else, Mr. Cohen?

MR. COHEN: Your Honor, while I'm standing here, would you also like to hear our position with respect to the

interrogatories?

THE COURT: Yes. Well, are you done -- one thing at a time, are you done with the charge?

MR. COHEN: With respect to the charge, with all due respect, understanding your Honor's prior rulings, we would move for the admission of the charge we've submitted to the court earlier before those rulings.

THE COURT: All right, that's denied.

MR. DELANEY: Your Honor, I understand what you're going to do with substantial factor, I'd like to just preserve an objection.

THE COURT: To what?

MR. DELANEY: I believe that there's case law that suggests that the defense of shipper damage has to be solely, and result solely from an act of the shipper. I can't cite you to a case, all I'm doing is preserving the objection.

THE COURT: Well, you've got a law firm back there that ought to be able to tell you.

MR. DELANEY: I'm searching, but --

THE COURT: In lieu of any case law which suggests to the contrary, actually, I have a law clerk that ought to be able to tell me, too, he's a lot closer. All right, we'll look at that. Go ahead, Mr. Cohen.

MR. COHEN: Are you ready to move to the interrogatories?

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THE COURT: Yes, let me pull them up here, grab them. Go ahead.

MR. COHEN: The interrogatories break out into two separate questions the issue of inadequate packaging. We believe that that to be most sufficiently handled by the jury in one interrogatory question.

THE COURT: In what respect?

MR. COHEN: Instead of asking separately was the cargo inadequately packaged by the shipper, not by Accu-Spec, if we're going to do that.

THE COURT: Hang on a minute. I'm sorry, start that all over again.

MR. COHEN: Thank you, your Honor. With respect to the interrogatories there are, number two and number three. I believe that can be most efficiently handled by the jury in one interrogatory.

THE COURT: What would you suggest?

MR. COHEN: I would suggest it would say if the cargo was inadequately packaged by the shipper, was lack of proper packaging a factor in causing the damage to the cargo?

THE COURT: Then it doesn't let them pass on the first question as to whether it was improperly packaged, it just takes them right into causation, is that right?

MR. COHEN: Well, that would pull it all together, yes.

THE COURT: That doesn't make any sense.

MR. COHEN: Number four, your Honor, is the interrogatory with respect to the reasonableness of the damages. It reads "was it reasonable for the plaintiff, after discovering that the cargo was damaged, to have the damage inspected by a representative of the manufacturer from England?" We would move that that be changed to reflect inspected in the United States. This is the man, Mr. Dunn, he wrote an e-mail, it said looks totaled, you better ship it back, I'm going to cancel my trip. Then they flew him out anyway. We'd like to argue that if you wanted to inspect it, sure, you would have gone to England when you wouldn't have --

THE COURT: You can argue that, that's the way it's going to stay. What else -- I have a question, it's my own interrogatory form. Six and seven, you'll see, we've broken out damages for both, "what amount, if any, is plaintiff entitled to recover from Central Transport?" "What amount, if any, is plaintiff entitled to recover from Logistics Plus?" As I look at that, that doesn't make sense to me. Does that make sense to you or do you have some other suggestion?

MR. COHEN: Well, there has to be a break point, it says "proceed to the next question" -- if it was packaged inadequately --

THE COURT: Wouldn't this be true. That obviously there can't be different amounts of awarded against Logistics

and Central. But by all of this -- if Logistics is found liable, does it have a claim against you as a matter of law?

MR. COHEN: I don't believe so.

THE COURT: You don't believe so. What do you say about this -- how should I set this up?

MR. DELANEY: I think that the jury simply ought to be asked one question. What is the amount of the actual loss suffered by Accu-Spec. I think that the Carmack Amendment makes both of the defendants liable. They haven't made cross-claims. There's an apportionment section of the Act, but there aren't any cross-claims filed. I don't know if they contend apportionment can occur here or if they intend to litigate it later. But I think I get a judgment against both of them if the jury comes in with any amount of money damages.

THE COURT: So you're suggesting that I just mold -- well, sort of mold the verdict, in other words -- well, what do you say, Mr. Knox?

MR. KNOX: Your Honor, if I may. I would venture, your Honor, that as a matter of law we do have a claim over Central. If you look at the apportionment subsection, 49, 14706(b), all we have to do is we have to show that the loss or injury occurred with the carrier over whose line or route -- is entitled to recover from the carrier over whose line or route the loss or injury occurred. So we proved that that loss or injury occurred here with Central Transport, I don't think

anybody disputes that.

THE COURT: Mr. Cohen, do you have any words of wisdom on six and seven; obviously, it would be unusual to have a trial without having the jury, after having heard three days of testimony, the ability to bring in a verdict against somebody?

MR. KNOX: We would prefer to have the apportionment done here.

THE COURT: What does that mean, what does apportionment mean -- are you talking about in the context of joint tortfeasors?

MR. DELANEY: Well, they're not joint tortfeasors, they're statutory jointly liable. If the jury returns a verdict, I believe that I have the right to a judgment, Accu-Spec has a right to a judgment against both. We can only collect once, but we can choose to collect against one or the other.

THE COURT: Well, if you collect against Central, then it moots the point about contribution?

MR. DELANEY: It sure does.

THE COURT: I'll tell you what I'm going to tell the jury. Then no harm no file. I'm going to have -- let me just think about this. Isn't it true as a matter of law that the jury can't find one party liable without finding both parties liable?

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MR. DELANEY: Under this set of facts, yes.

MR. KNOX: Again, your Honor, that provision in the apportionment statute is all we have to prove is that the loss or injury occurred --

THE COURT: That doesn't mean that you can't be found liable, that has to do with your claim over. What I'm going to do with the jury, they're going to have a line for both. They will be told that whatever amount -- I think they're going to be told two things. If you find that Central Transport is liable, you must also find that Logistics is liable. And if you find them both liable, you must find them liable in the same amount. But there will only be one recovery. And then the issue of -- then we'll take up this question -- it's not up to the jury to declare as a matter of law -- apportionment is the wrong term, it's not up to the jury to declare as a matter of fact that you have a claim over as against Central. I can declare that as a matter of law, which I probably would do.

MR. COHEN: With respect to the potential future claim of Logistics Plus against Central Transport, if such a claim existed, there are defenses to that claim, which would be litigated.

THE COURT: I have no doubt. All right, that's what we're going to do, we'll clean this up. Yes, sir.

MR. COHEN: I think there was one technical item, and maybe I'm confused. In number three if they find if the cargo was inadequately packaged and the lack of proper packaging is a substantial factor in causing damage to the cargo -- don't proceed to the next question, I think it's done.

THE COURT: That's correct, you're right. All right, we have a little more tinkering. How long is your closing?

MR. DELANEY: Twenty-five, 30 minutes maybe.

THE COURT: How about you, Mr. Cohen?

MR. COHEN: Similar amount, your Honor.

MR. KNOX: I would think it's 15, 20 minutes. Could I ask for about five minutes, in light of some of the rulings here, to tinker with my closing.

THE COURT: All right. We're going to take a short recess.

(Recess from 1:45 p.m.; until 1:50 p.m.)

MR. KNOX: I think you made some comment from the bench that if you recover against one defendant, you recover against all, something to that effect?

THE COURT: The way the case is presently postured, would it be possible for the jury, for instance, to bring in a verdict against you without bringing a verdict against you, that is Central for the record. I would say no. And, conversely, I don't see how they can bring a verdict against Central without bringing a verdict against you under the

statute.

MR. KNOX: I thought you said -- if you think about it this way, if you make out a prima facie case, the burden shifts to us, Mr. Cohen and I have to meet our defense, can I make that defense. We're going to argue that. Can Central Transport, they may not. I think we have a better chance because I think we can prove that we aren't negligent, if they buy the package theory, I don't think they can.

THE COURT: That's not the whole story. The rest of the story, by all lights each of you would have to prove, essentially, under the Act is the equivalent of intervening acts or superseding cause. Which in this case would be that -- was that the shipper was responsible for the damage because of bad packaging. In other words, it's not enough for a jury to let you off the hook because you're simply not negligent. They also have to find that the packaging wasn't any good.

MR. KNOX: If they agree that packaging is properly proved as a defense, then they also have to prove that there is no negligence. I think we can prove that. I don't think they can. Again, it's a two-prong defense. Again, that assumes that the jury would have to buy the packaging defense. If they don't buy the packaging defense, I would agree with you. If they don't think it is potentially very likely.

THE COURT: I see what you're saying. What do you have to say about that?

MR. COHEN: Based on the court's rulings, the packaging defense is equal.

THE COURT: Everyone shares in that?

MR. COHEN: It's packaging. He's going to argue package defense. I'm going to argue packaging defense.

THE COURT: Here's the problem, John. A packaging defense, if successful, is exonerative of both of you, you never reach the question of negligence.

MR. KNOX: You're right.

THE COURT: All right.

(Recess from 1:58 p.m.; until 2:30 p.m.)

THE COURT: Sorry for the delay, sometimes things take longer than anticipated.

THE COURT: We're going to play it by ear. You're certainly going to hear all of the closing arguments today. The guesstimates is all combined that should take something around an hour and a half. So with a short break, I may or may not give you my charge this afternoon. In all likelihood you're going to get it early tomorrow morning, we'll see. All right, Mr. Cohen, are you ready to go?

MR. COHEN: Yes, your Honor.

MR. DELANEY: I think Logistics goes first if we reverse it --

THE COURT: That's quite all right. This is one of those situations insofar as I'm concerned, it does not make any

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difference. I would defer to defense counsel as to who wants to go first. I'll break the tie.

MR. COHEN: I'll go first, your Honor.

THE COURT: For all counsels' information and edification, that 30 minutes is really the top end, so keep that in mind as you're working through your closing.

MR. COHEN: Thank you, your Honor. Good afternoon. You made it, you made it through all that testimony, congratulations. Thank you very much for your patience and your time, and my client, Central Transport, appreciates you serving today. It's an honor and it's a big responsibility.

And this case is a claim about freight damage and the parties really take this seriously. That's why it's come to a trial in federal court. So thank you very much for that to begin with.

In this case you heard a lot of testimony about a lot of different things. You heard testimony about paperwork, you heard testimony about packaging. You heard testimony from different people from the various companies. What I'd like to focus on in this closing is the particular steps you're going to have to go through in coming to your decision when you go back to the jury room. And we're going to go over all the evidence briefly with respect to those choices.

You're going to have to determine, the first thing you're going to go back there and have to decide is whether or

not the freight was delivered to Central Transport's driver in California in good condition. That is the first element, was it delivered to that guy, that truck driver in good condition.

The next step you're going to have to decide is when it got to the warehouse or to Accu-Spec in Erie, was it in bad condition.

Now, the third thing you would get to is damages, if there were any, we'll get to those.

Let's talk about the second element first. Did the freight come to Erie and arrive in bad condition. I don't think there's any doubt. You've saw those pictures 20,000 times, the thing was damaged, okay, clearly it was bent. No question about it. So that one is done, okay.

But you got to go back to the first one. The first one, was it given to the truck driver in California in good condition. This is a burden that rests with the plaintiff to establish before you can go forward, you can move on. It's

Central Transport's position, we ask you to find that there's not enough evidence to establish that it was given to the truck driver in California in good condition. The reason Central Transport is asking you to come to that conclusion is based on the evidence that came through the witness stand and through the documents.

There is testimony from the Dage employee, his name is Joe Fisher, who was on the video screens. He testified that

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he was not there the day of the shipment. He testified, also, that he was not the guy who put the machine into the crate. So doing a time line, you want to fill every spot before you get it into the truck.

In this case the plaintiff had the burden to do that with enough evidence to make it clear that it was in good condition. We don't know some things. We don't know if the freight was packaged into the crate in good condition. We don't know if it was damaged before it actually got in the box. We have not heard testimony from that person, I think his name is Tran, he may have been the person who packaged it. We have no information with respect to the actual, once it was in the box, what happened in moving it into the tractor-trailer.

We do have, let's be very clear about the evidence, both sides, there is evidence on both sides, you have to weigh it, it's your job. There is a piece of paper, that bill of lading, and the driver, Grminder -- I forgot his name, the driver signs it. Okay. We had testimony from various people about what the driver's job is, what the driver's job isn't. The driver can't be everything to everyone. They have certain responsibilities. They drive the truck. They have DOT certification. They look and see is it a crate. If it's a crate, that's what I'm here to pick up, crate, in the truck.

This crate on the outside of it did it have some visible damage. However, the damage on the outside of the

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crate wasn't all that great. Is it possible that this truck driver saw the damage and he didn't report it. We don't know. We really don't know because we don't have testimony from the people in that section of the chain.

We have the guy who inspected it a few days before, though, he wasn't there the day it was packed, he wasn't there the day it was put into the truck. So because we're missing those links and the only evidence to suggest otherwise, is the signature of the driver on the bill of lading. And the fact that no reports of damages were created. We're asking you to find that that is not enough. You got to fill the links, you got to link the chain together to get into the truck. That's the first point.

Now, we checked the signature on the bill of lading. We have signatures in this case on another piece of paper, it's that delivery receipt, let me put it up. This is the delivery receipt. The delivery receipt has a signature on there as well -- by Mr. Mullen. So, plaintiffs can argue that the signature of Grminder Shing means that was in good condition. But the signature of Mr. Mullen doesn't mean that it was in good condition. You know, listen, these signatures are what they are, they only have so much weight. As you can see, there's been testimony that that signature -- oh, I made a mistake, it was damaged. Mr. Mullen, he was straight up.

THE COURT: Mr. Cohen, I'm sorry to interrupt you,

you're going to have to slow down for the court reporter.

MR. COHEN: Thank you, your Honor. My point is with respect to the signatures on the papers, they only go so far, it's for you to weigh that. That's just one part of Central Transport's defense in this case. So we talk about step A, did it go into the truck good; step B, did it come out of the truck damaged. We say step A is not fulfilled. Step B, yeah, it came out of the truck damaged.

The next thing you have to decide in your chain of decisions back there is what was the cause really of the damage to the X-ray machine. There's been a lot of testimony on this. A lot of people came up here and testified about that. There's two things that could have caused damage to the X-ray machine. Improper packaging or improper handling, one or the other. Improper packaging, improper handling.

Here we believe that the testimony is overwhelming with respect to its substance that there was improper packaging of the machine for transportation across the United States of America. Okay. So you're going to be asked if the cargo was improperly or inadequately packaged.

I'm going to briefly go over the evidence as to why

Central Transport is asking you to find that the packaging was improper and insufficient for transportation of this sophisticated machine. Now, what I'm going to show you first is just a description, brief little description of some of the

things that were involved in this machine. I'm not going to get into much detail, quite honestly, because I don't really understand what some of the words mean, I just don't know what a job report is. But it's complicated, we know it's sophisticated stuff. You saw pictures of it and you could tell that this thing isn't like a box of rocks, this is very complicated stuff. This has computer screens, it has lead lining, it has all kinds of expensive and I'll say somewhat delicate components.

If you're your going to ship a machine like that, you're going to have to really, really make sure it's packed right. It's over two tons, like heavier than a car. So it needs to be secured in a tight space. During the opening statement for Accu-Spec, there was testimony that it was snug. The evidence, however, presented by the witnesses and the documentary evidence and photographs establish that it was not so snug.

I'm going to show you briefly just a couple of these pictures. This is one of the pictures of the machine that were presented. You heard testimony from a variety of people.

With respect to the packaging, you heard from Mr. Carlson. He is the president of Accu-Spec. Remember him, he was a long time ago, he was he first witness. He testified that he thought the machine, by looking at the crate, the damage, he thought the machine might have been dropped.

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However, he was quite candid, he admitted I'm the president of Accu-Spec, I don't really do much shipping or looking at crating, it's not his job, he's running a company, he admitted it. He told this jury, he told you that I don't see much of this stuff. So you, as the jurors, have to weigh the evidence, what knowledge base does he have, how much weight should I give to it.

The next testimony came from Mr. Mullen. Mr. Mullen is the person who arranged for the transportation, an Accu-Spec employee. He testified that he believed that it wasn't -- it wasn't the packaging. He again on cross-examination said, you know, I don't really do this, I don't have very much experience with this, I'm not a trucking transportation guy, I'm a project manager at this electronics company. There, thank you, Mr. Mullen. He's given us the information, you have to balance that.

After that, the Dage employee testified from the video. His name was Fisher. And he testified that usually when these things are packed, they're packed in sufficient packaging to move them around. And that he thought that it would be good enough. The thing with Mr. Fisher's testimony is that you have to think about, you will be instructed about this, is, think, Mr. Fisher works for Dage. They're the ones who packed it. They have an agenda, a bias. Everyone has a bias in life and in this case. But you got to think, well, Joe

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Fisher is the guy who is in charge of packing these things, is he going to get up and say no, it was not that good. Obviously, he's not going to say that. So you got to understand from where he was coming. Also, his level of intimacy with the facts. He only saw some pictures, he wasn't there at the scene looking at this thing.

Then you heard from Mr. Horetsky. Mr. Horetsky is, of the people who testified, he is the one who had absolutely the most experience, up to this point, he had the most experience looking at freight. That's what he does, for years and years he's been involved in the business, he's a sales guy in the trucking industry. So, you hang around crates, you see damage sometimes. He testified based on his substantial experience that there wasn't any internal bracing that that would be sufficient to keep this from moving around.

Now, what I wanted to point out about this machine and which is interesting, this machine was on casters. If you look on the bottom there, you see the casters. All right. You could roll this two-ton guy around, I guess, if you push it pretty hard, it's got wheels. So the machine has casters. However, there was no testimony that the casters were removed when it was packaged to move on the Central Transport truck.

However, interestingly enough, in evidence that was presented about when they moved it when it was going to get fixed, the company that moved it that time and packed it that

time, was smart enough to actually take the casters off. So this is an invoice from carting and storage, Erie, PA. They're the ones who packed it when it was going to go get fixed. And they indicate in their explanation that they did a few things. They removed the casters from the bottom of the machine, probably a good idea. They wrapped it with foam padding and packed it into the box. They set the machine on a hardwood skid, they actually secured it to the skid, and they blocked it. Now, that's how you're supposed to pack it. That's good.

What happened in the situation where the machine went from the Fremont showroom facility for Dage to Erie, is the casters were left on, the foam padding was left out, and it wasn't secured to the skid, and it wasn't blocked properly. So everything that these guys did right, they did wrong when they brought it out from Dage.

Now, how do we know, what about those casters. As far as evidence with respect to casters, you have to put it together. But one of the people who testified was the truck driver, Dale Meabon. He's the delivery truck driver, he came in with jeans on. He testified that he was there, he stuck around. He stuck around, he's curious, he stuck around to watch, let's see what they're doing, they open the box. He said it had rolled, he used the word rolled. He said it rolled to one side. Maybe it's because they didn't take the casters off, that might have been a good idea. That's a possibility,

that goes to packing.

With regards to packing as well, you know who's not here today, Dage. Dage packed it. Central Transport didn't pack it. Logistics Plus didn't pack it. Dage packed it. They're not here. They're the ones who were responsible for packaging. So if fingers are pointing, it's a shame that fingers are pointing but they have to have the truth come out and fairness come out really. The finger would be pointing at the packer, Dage.

Mr. Cackowski also testified, just to sum up some of the people with regards to this issue. Mr. Cackowski, sitting over there, he testified about he was the claims manager for

Central Transport, he's been there, sounded like forever. He had been there 20 years, he's had all kinds of jobs. Everything from rating, to beginning claims, all kinds of claims. Now he's the claims manager. He sees claims like this all the time. He has more experience seems like than Mr. Horetsky, Mr. Mullen, Mr. Carlson and everybody combined. He testified that has seen damage to crates, he has seen hundreds of claims. He has seen the damage to crates, and he testified that the problem here was that that piece of machinery was not actually snug in the box. It had space on either side. It's a packaging principle that he testified to, as did Mr. Berlin. That it's a packaging principle that you fill voids. It's common sense, I mean it's not rocket science, packaging

science, you fill voids. You got to fill them because otherwise freight tends to move around in there. It's not like it's being carried, you know, it's not like it's being carried by -- something slid along. This thing is on a truck, it's in the back of a tractor-trailer. If you've ever seen one go down the highway, rumbling along, that's what they do, they're tractor-trailers. They're not airships. So they make some normal movement. If you're going to pack a piece of freight, you're going to have to fill the voids.

You can fill the voids by doing a couple things. There was testimony from Mr. Cackowski that he should have braced, internal bracing. In packaging there's external box and internal bracing. There should have been either boards bracing the machine or better yet, he said -- why don't you remove this shelf. The shelf should have been removed, and then you could have had it flat up against there. And this thing wouldn't have rolled over or it had nowhere to roll. If you built the wall here, you wouldn't have had that problem. In fact, this machine, Mr. Carlson, who purchased the machine, testified it was about six by six by six, that was an approximation. I mean I'm not going to hold him to that, he didn't measure. That box was listed about seven-foot five, by 5'9", by 72. It's a couple feet on each side of this thing. Either you got to fill it or you got to make the box smaller. You either got to fill it, brace it or make the box smaller, really that's what it is. Sorry I'm speaking so quickly. But these things were not done.

Now, all of these witnesses testified. Mr. Horetsky, Mr. Cackowski and Mr. Meabon, they all worked for Central Transport. You're making a decision as to the total picture of how this happened. You can consider all that with respect to, but I think that -- well, it would be for you to determine, quite honestly, it doesn't matter. It will be for you to determine the credibility of Mr. Meabon, the truck driver. It will be for you to determine the credibility and weight to give the evidence from Mr. Cackowski, the freight claims manager. It will also be for you to determine and give weight to the evidence from Mr. Horetsky, what he thought. You can think a lot of it, you can think a little of it, it's your decision. We think that this evidence is overwhelming.

And the other piece of evidence that came in was Mr. Berlin. Mr. Berlin of Logistics Plus testified that he has an awful lot of experience packing, too. And he said that he knows that there's a way to actually inject foam that hardens. You can imagine the insulation you put in your walls, you can spray it, it gets hard. That's the kind of thing that they can put, that would have been great, that would have kept it from shifting around. He testified that that actually would have prevented the damage.

So the last testimony, if you will, that we got with

respect to packing was from the tip and tell. The old tip and tell. This was more of a handling than a packing issue. Let me show you what I mean. This box had a device on it, a tip and tell. The tip and tell, I am confident that I can tell you the tip and tell has no bias. The tip and tell must tell the truth. The tip and tell was put on at Dage. The tip and tell did not reflect any tipping, it was not activated.

So if you want to discount everybody else's testimony and listen to the tip and tell, that is a piece of evidenced for you to consider with no bias. It's a piece of machinery.

So with respect to this freight handling, when you look at the total evidence, we believe that you will come to the conclusion that it was the packaging. Again, two things can cause damage to freight on a truck. It can be packaged badly or -- I'm going to use the word that I think will be presented to you, or it could be handled improperly. There is, we talked about packing now, I'm sure you're done with it, we're done with it.

But with respect to handling, there is no record anywhere of improper handling. Mr. Cackowski testified that it's the procedure of the company for reports to be made of improper handling. He's the claims manager, they build a file, open a file, evaluates things. He evaluates the bill of lading, delivery receipt, any information about improper

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handling. Inspection report, there was no information about improper handling because there was none. If there was, there would have been a piece of paper associated with that.

So when you couple that with the visualization really of what happens in the back of a truck normally or in the back of a bus, whatever things rumble down on the highway from California, you're going to understand there is a certain amount of movement that the thing is going to have to withstand. Because it has to be transported in a truck. In this case it also has to withstand being picked up by a forklift and put down by a forklift, maybe a couple times.

So we believe that there is no testimony which weighs in favor of concluding that the freight was mishandled. In other words, we think the balance of information is much more in favor of the packaging that caused the problem, rather than handling. There is no question that a couple people out here think that it was dropped. These are people that have very little information on packaging. So that is how it comes down to on the packaging defense for Central Transport.

Now, the other thing that I wanted to draw your attention to is the issue of -- well, if you find that the packaging was improper and caused the damage, then, really it's not Central Transport or Logistics Plus that should be found to pay for it, really the finger or the responsibility would rest with Dage. And Dage isn't here. Dage is not here. So that's

what we have for packaging.

The other issue is with respect to damages. If you decide that the freight went into the truck and in good condition, came out in bad condition, and that the packaging was not a contributing factor in creating the damage, you're going to have to determine, well, what are the damages. This lawsuit is about money, so what are the damages. You're going to have to find that those damages are reasonable.

Now, this is a machine, nobody knew it was an X-ray machine. But now we know it's an X-ray machine that they flew to England. But before they flew it to England, they had an English scientist or engineer fly over here, his name is Peter Dunn. There was testimony and evidence in the form of an e-mail that Mr. Dunn wrote, he got the pictures. They were e-mailed to him. He wrote this thing looks totaled. You got to send it back to England, I'm going to cancel my flight, I should show you that. What happened is he said, you know, he was the one who testified about the leaky radiation, don't turn it on. He said right here, I will cancel my trip, I've already inquired about getting a new system. What happened instead is they flew him out and it cost about $2,100 to do that. Ultimately, they sent the machine back to England anyway. If you get to damages, which we would ask that you don't because of the evidence, we'd ask that that expense be eliminated because he could have inspected it in the UK, just as well as he could have inspected it in the U.S. Here he had the opinion that it was totaled, he didn't need to fly out here and spend $2,000 to do it.

Well, that's pretty much Central Transport's defense in this case and position. We ask that you find in favor of Central Transport based on your evaluation of the facts and the evidence and the documents presented. Thank you again for your time, you've been very patient with this case. Okay, thank you.

THE COURT: Mr. Knox.

MR. KNOX: Thank you, judge. Good afternoon. Ladies and gentlemen, I want to echo Mr. Cohen's sentiments and thank you for your dedicated service and patience here. My parents told me to always say that and I always do say that in trials, I do sincerely mean that. But in this case I really mean it. I wish we could have offered you a much more exciting case to digest here. The fact that you had to sit back and listen to three companies argue about damaged freight I think makes your service even more compelling. I do truly want to thank you.

You've heard a lot of information, you've heard a lot of testimony. You've seen a lot of evidence here today. A lot of it is probably too excessive. A lot of it is too confusing. If we've done our job, we've given you enough information. But our job really at this point is to distill

that information, boil it down to really the bare facts that you need to decide this case.

If you can focus on some key issues here. I think your decision will be relatively easy, notwithstanding the fact that you heard so much about wine glasses, classes, all sorts of stuff that maybe you've never heard about. In a moment the judge will in fact instruct you on the law here.

Again, we are in federal court. How did we get in federal court to have this trial. The reason we are here in federal court is that we have a federal law that applies here. It's very unique. Very different, this isn't a run of the mill somebody runs a stop sign automobile accident case. We have a law and the law tells you what to do here.

And what the judge will instruct you is that in order for Accu-Spec, the shipper, the plaintiffs suing here, in order for them to recover, Mr. Cohen is exactly right, they have to prove three things. Number one, that the crate was delivered to Central Transport in California undamaged. Number two, that the crate arrived in McKean at Accu-Spec's facility damaged. And then they have to prove their damages.

Now, I'll leave that up to Accu-Spec to argue whether they've proven that case. That's the first step under the law.

The second step is that the defendants, including Logistics Plus, my client, then they get to defend that suit.

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We get to do so through evidence and testimony. And the standard in proving that defense is through a preponderance of the evidence. Again, the judge will instruct you on what that means. Maybe you've heard that term before. What that really means very simply is a little bit more evidence saying yes than no. He'll talk to you about the scales of justice. It's a pretty apt analogy as to how to look at evidence. If you think it's a little bit more evidence than not, then neither side has proven the defense.

Now, in order for us to prove our defense, there are two things. Logistics Plus has to prove, number one, that it was not negligent. Number two, it has to prove that through the act of the shipper something caused this damage. A substantial role, played a substantial role in causing these damages.

Central Transport I think has done a very good job, I don't want to belabor the point over the packaging defense. But we share that defense. We agree through the testimony of Mr. Berlin, Mr. Cackowski and other people, really the people who have the most experience here, that in fact the packaging defense is not some technical defense to get us off here. This is a real defense.

First I want to talk about the first element, that's proving negligence, or the lack of negligence on our part. Again, we have to prove that. Accu-Spec doesn't have to prove

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negligence on our part. We have to prove that we were not negligent, just so we're clear.

Let's talk about that first. Do you think by a preponderance of the evidence that Logistics Plus was negligent. Ladies and gentlemen, I don't think I have to argue that point very strongly. Which it's a nice position to be in a case like that. Because I think the witnesses, all of the witnesses here really have done that for me.

The main allegation, as I alluded to in the opening, is that essentially we have somehow misclassified the freight. Misclassified it, this X-ray machine, it should have been a Class 100, meaning freight that is more fragile, more susceptible to breaking and that it should have been handled at a higher degree of care. That essentially is the main allegation of negligence on our part.

Well, let's break that allegation down. We should have identified the X-ray machine as Class 100. Ladies and gentlemen, you heard a lot of testimony in this case, but have you heard any testimony that says that we were told that this was an X-ray machine. Have you heard any testimony, have you seen any evidence that we were told that this was a $120,000 X-ray machine or that it was fragile. Clearly, the answer is no.

The only thing we have is this e-mail from Jim Mullen. I'll put that document up. That's really the only

evidence that they have saying that they told us anything about this shipment, other than it was a crate. It's a key document. You have to think about really what is being ordered here, what is being shipped. This is not a set of steak knives, this is not a crate of tennis balls, this is something extremely valuable, a $120,000 X-ray machine. And there is no written documentation saying that. There's no conversation confirmed by anybody. In fact, the key witness, Mr. Mullen, in front of everyone in open court admitted that he didn't tell anybody it was an X-ray machine. He admitted that he didn't tell anybody that it was worth $120,000. And if you plug that testimony into the allegation that we were somehow negligent because we misclassified the freight, you need to think about that. If he doesn't tell us that it's an X-ray machine, how should we have classified it as an X-ray machine, let alone a valuable X-ray machine. Does that make any sense. It really doesn't. And I think it's a little sad that we even have to address that issue, quite frankly.

This is clearly a situation where you don't need to be an expert in the shipping industry. I don't know about you, but I have never purchased anything, other than my home, that is worth $120,000. But I do know that if I ever do purchase something for $120,000 on e-Bay or anywhere and I got to order it, I'm going to tell whoever I'm ordering it from what that is for sure. I'm sure you would do the same. You don't need an

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expert to know that. You can come here with your common sense experience and you'll reach that same conclusion, I feel pretty confident about that.

Now, let's break down the second part of that allegation. Class 100 cargo being cargo which was fragile and needed to be transported with a higher degree of care. Again, have you heard any testimony or seen any evidence that basically says that. No. In fact, all of Central Transport's witnesses, including their truck driver agreed, that class really isn't an issue here in terms of how somebody handles the freight. It doesn't really correspond to somebody picking it up on the dock and treating it like with kid gloves, it just doesn't. And if that's the case, I think you dissect the main allegation of negligence, clearly we're not negligent. Clearly we're not negligent. Now, strangely enough this allegation about class having some corresponding relationship for fragile or how you're supposed to handle it, put that all to the side, and you might be wondering why I was constantly putting up the that silly picture about the crate with the wine glass. But you remember that wine glass communicates to the person on the dock, the truck driver, that this is in fact fragile. You should handle this with care. They don't know anything about class. You heard Mr. Meabon, the truck driver, say that. They know what a wine symbol is, everybody in this courtroom knows what a wine symbol is. So I think that is quite an interesting

point as well.

In any event, just as I predicted in the opening statement to you, as I just argued, I don't think there's any evidence here at all that shows we were negligent with respect to that main allegation.

Now, there are some other allegations out there about wrongdoing generally floating in this case. Number one, that this item was perhaps poorly packed. Okay. That very well may be. I think Mr. Cohen has touched on that, I'm going to touch on it a little bit further. But in many ways that does not involve Logistics Plus if that is the allegation of negligence. We don't pack this. Again, we're here in Erie, Pennsylvania quoting prices, directing carriers to do things and that's about it. We're not there, we are not packing. So if packing is some allegation of negligence, we're not involved with that.

The other general allegation of wrongdoing here is mishandling of the freight. And, again, similarly, we're not handling this freight. Can we be negligent on that. I don't think so. So those are really the allegations of negligence here.

The Class 100 issue, we should have classified something that nobody ever told us about, really that doesn't make sense. The packing, clearly we don't do the packing. The handling, we don't do that. So, in sum, on this first point of our defense, I think we easily meet that. There is no evidence of negligence on our part.

Now, the second part of that defense, as I indicated, is the defense that the action of the shipper, in this case Dage, or Accu-Spec, they are somewhat interchangeable, which is a little confusing, that they improperly packed this piece of equipment.

I think Accu-Spec probably has a lot of sympathy in this case, if I were sitting in their shoes. After all, here's a growing company, here in our neck of the woods, that orders this big machine, it's very valuable, it's very important to them, and it shows up and it's smashed. I would be very upset if I was Mr. Carlson. I don't envy you. But, again, we are in federal court here and we have this very unique law that applies. And really, as Mr. Cohen so thoroughly touched on, this crate clearly was not packed right. And that is not just some technical defense here to get us off. I think a good question to ask you folks is how many here, I'm not asking you to raise your hand, I'm asking you the question, think of the answer in your head. How many of you have bought a television set recently. And think about how a television set is packed in that box. Just a stupid TV, maybe $250 TV. You're going to get at Best Buy, at Circuit City. You'll open that box, what does it have already around it, it drives my wife crazy, she says it's hell on earth with it being a styrofoam suit in a

styrofoam room. All that squeaky styrofoam, just around a $250 TV. That clearly makes sense. Why because that TV maybe even coming from Japan, maybe from California.

In this case we have a $120,000 X-ray machine with metal on wood, with no buffer, nothing like that in a TV crate. We just have some cellophane wrapped around this thing. You've heard the witnesses in this case testify about the foam packaging. Mr. Berlin, who heads our client's company, Logistics Plus, he's a great guy. He's an interesting guy with a varied, varied background. And I think you might have got that from his testimony. He's driven a forklift, he's driven a truck. He's run a company, he's employed people, he's been in the shipping industry, he lives and breathes it. He has a background, he has credibility, he has authority. What did he say about this issue. He said really it's a pretty simple thing, all you have to do is get a foam packing device, fill it up and it's pretty snug. You're probably going to get some bumps along the way, as Mr. Cackowski indicated, and that's natural to understand, you're driving across country. I think Mr. Cackowski said this isn't a situation where you're going from Erie to Altoona. You're going cross country, perhaps at three in the morning sometimes, who knows. Who knows what pot-holed filled roads are out there. And you have metal on wood with nothing protecting it. Interestingly, also, you have a machine with casters. Attorney Cohen showed you a document,

how another company took the casters off. What are casters. Casters are wheels. Why wouldn't you take wheels off of a shipment that valuable and important that is going across the country. Doesn't make any sense.

Again, I think the funny thing about this case is that throughout all this information here, you can really apply your varied real world common sense. I've never packed an X-ray machine. I don't know if you have either, I suspect you haven't. But I think anybody looking at this would say that doesn't look too good. That looks like the U-haul that I packed when I came back to Erie from law school, I jammed everything in there. Hard stuff on hard stuff. There is no insulation, there is no bracing, I think it's irresponsible.

One of the other interesting facts that I think you need to remember. A little fact that Mr. Fisher mentioned. This was a used crate. This crate originally came from England, it was used. They used it at the demo shows, it is a relatively new machine. No doubt about that. But the crate, that has been used. Whenever I mail something in an envelope, I don't reuse that envelope as much as I might want to save some money. But they have reused the crate and they didn't pack it properly. I think you need to factor that into your analysis.

But I think on this point the main issue, like Mr. Cohen touched on, is the credibility of the witnesses. The

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only witness really in this case who has spoken to the fact that this was packed correctly is the guy who packed it. The guy who has not been sued, the guy who is not here. Again, I bring that up because your tendency may want to be you want to award Accu-Spec damages here because after all they just ordered this thing, they didn't do anything wrong, right. Again, we'll argue that maybe they did, but it doesn't matter in this case. But the fact of the matter is that packing really played a role. They don't like to hear that because Dage wasn't sued, but that's the case.

Ladies and gentlemen, those are just some of the points I wanted to touch on. I hope we haven't given you too much information, I hoped this exercise in closing argument has kind of helped you to finally see some of the information so you can decide this case. It's a little bit of a different case, but I really think that if you listened to what we said here, that you will find for the defendants here that we met our defense. I'm want to thank you for your time, it has been a pleasure to appear in front of you. Thank you.

THE COURT: We're going to take five minutes, then we're going to hear from Mr. Delaney.

(Recess from 3:20 p.m.; until 3:42 p.m.)

THE COURT: All right, Mr. Delaney.

MR. DELANEY: Thank you, your Honor. Hello, folks.

This is the time we get to talk about what conclusions to reach

based upon the information that we've heard. And I do want to go down through things sequentially. But I want to start by correcting a mistake, what I believe is a mistake. Mr. Cohen was talking about the reasonableness of the claim we were making. Talking about the damages that we had incurred, expenses we've incurred, and he suggested it was inappropriate for us to have an engineer come to Erie to inspect this piece of machinery. He showed you this e-mail and suggested that it demonstrates, this is Plaintiff's Exhibit 24, and he suggested that it demonstrates in this paragraph that the engineer had already said I'm canceling the trip, I don't need to come, but we had him come anyway. That's not the engineer who is writing that e-mail. That's the gentleman from California, Peter Dunn was the engineer who was coming from England. This gentleman simply is telling us that he's been made aware of the damage that has occurred and whatever trip he had, whatever trip he had planned, he was cancelling to try to arrange for a new machine. I just wanted to clear that up right at the outset.

It isn't at very complicated set of facts that we have. We know that there was a shipment that left California on February 5th of 2003, arrived in Erie on February 14th of 2003. We know that when the shipment arrived in Erie, that the package, the cargo was damaged. And they've now admitted that. You've heard both Mr. Cohen and I believe Mr. Knox acknowledge that that aspect of the case isn't important to you anymore.

You also heard a great deal of testimony in this case about new or used. He heard Mr. Berlin say that whole issue came up just a couple weeks ago. That issue is out. You don't even have to think about that issue.

What do you have to think about. Well, as I said in the opening statement, we're here in federal court because there's a federal law that determines the relationship between shippers, that's us; freight forwarders, that's Logistics Plus; and motor carriers, that's Central Transport. It's called the Carmack Amendment. And it essentially says that when a shipper turns over goods to a motor carrier in good condition, and those goods then are taken to their designation and at the destination they're found to be damaged, the shipper collects. The shipper gets to collect from the freight forwarder, who may have never touched the goods, and from the motor carrier. Not doubled the amount. But it provides a shipper, like Accu-Spec, with the opportunity to go to two different sources for collection. That's the Carmack Amendment.

Now, there's a defense. If we establish for you that the goods were turned over in good condition and then arrived in damaged condition, and we had money damages, we collect. But there's a defense. There's a way for the motor carrier, the freight forwarder, to avoid liability. And that's to show that we, the shipper, caused the damage.

Now, let's think about the proof. Let's think about

what we have. I guess before I talk about the details, I'm going to touch on something you'll hear about from the judge. And that's different kinds of evidence. There are really two kinds of evidence, direct evidence and circumstantial evidence. Direct evidence is something you see for yourself. You make an observation, you can testify to that observation. The people who saw the crate, for example, when it arrived at Accu-Spec, saw its condition. Their testimony is direct evidence about the condition of that crate. Circumstantial evidence is evidence that could allow you to reach conclusions based on the circumstances. The judge will tell you that circumstantial evidence is as weighty, as important, as valid as direct evidence. It's up to you to make the decision about what inferences can be drawn. So we have circumstantial and direct evidence.

Now, let's think about the proof of the elements that need to be established in order for us to recover. The first thing we have to do is establish that the goods were turned over to Central Transport in California in good condition. What do we have.

Well, the first thing we have is Mr. Fisher. Mr. Fisher is the gentleman we saw on the video screens. He told us that he wasn't there that day, but he assigned a technician. He's the guy in charge. He assigned a technician to watch over the crating and the loading of the piece of equipment. And he said that there's a policy in the office over which he overseas, that if there's a problem, if there's damage to the freight, if there's damage to the crate, if there's an unusual event during the process of loading that crate onto the truck, there's a written report that needs to be filled out. And he testified that he had been through the file with regard to this piece of equipment. And there was no such report ever filed regarding the events of February 5, 2003.

Now, we're establishing a non-event. We're establishing a negative in a sense. But that's circumstantial evidence that nothing bad happened on that day. That the equipment and the crate were in good condition when it went on the truck.

What else have we heard. Mr. Fisher told us that he interviewed the technician who he assigned on that day. He also said he had another employee, a young lady who was the receptionist in their office in Fremont, California. And he asked them what had occurred. Did they report verbally that their had been any damage occurring in the crating and loading of this piece of equipment onto the truck. He said no, they reported nothing. Again, our effort to establish a non-event, a negative, in essence. Circumstantial evidence that there was nothing unusual that occurred in California and that this crate and this piece of equipment was turned over to Central Transport in good condition.

There's more. You heard Mr. Horetsky. Mr. Horetsky was the Central Transport representative, I think his office is in New York state. He was the gentleman that came down and visited Accu-Spec on the date of the delivery. But Mr. Horetsky explained in response to questions that I asked him, that if a crate is ready to be picked up by a Central Transport driver and it's damaged, the driver usually will not pick it up. Nope, here the driver did pick it up. Again, circumstantial evidence that there's not a problem with the cargo on February 5, 2003.

Then there's another thing. There's a bill of lading. This is that one-page document that was produced by Logistics, actually made up by Logistics. And it is Exhibit 25. The Logistics' bill of lading for the pick up in California. Demonstrates that it has a Central Transport emblem on it. And it was signed on February 5, 2003, and it was signed by the driver from Central Transport. And is there any notation, I asked Mr. Horetsky, is there a procedure for making a notation on the bill of lading about damage. And he said yes. Is there any notation on this bill of lading when that product was picked up in California. No. Again, circumstantial evidence that the cargo was in good condition when it was turned over to Central Transport in California.

Is there any evidence to the contrary? No. What Mr. Cohen did was suggested to you all that the bill of lading

doesn't mean anything. Because look at the receipt that Jim Mullen signed. Here, February 14th here in Erie. He signed it, didn't notice, didn't note any damage to the equipment or the crate, even though he had made an observation. Look at that. But the distinction is Mullen got on to the phone and called and said, you know, I just let the truck driver go, but this thing is damaged. If these goods were damaged when they left the dock or left the Dage facility in Fremont, California. They changed trucks three, four, five times before it got to

Erie. The damage is visible based on what we saw from the photographs. Why didn't somebody along the way say seems to be damaged goods. Well, they didn't. They didn't. Somewhere in that route someone mishandled this cargo. And then just put it on the truck. Just put it on the truck.

I would suggest to you it's probably near the end of its trip. Because if it showed up on a dock, let's say in Chicago, damaged and the dock worker in Chicago didn't do that damage, he's going to make a record of it to save his own butt. So somewhere in that chain of custody, and they've acknowledged that they had exclusive control over this cargo from California to Pennsylvania. Somewhere it was mishandled, probably near the end of the trip. I found Mr. Meabon, I think Mr. Meabon, who was the driver, was completely credible. He just shows up at work in the morning, the cargo is already on his truck. I don't think he did anything wrong.

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So is there evidence that establishes that the cargo is in good shape when it was turned over to Central Transport out in California. If we look at all of that circumstantial evidence on the one side and look at the utter absence of any contrary evidence on the other side, I would submit that you should conclude that by a preponderance of the evidence it's been established that this cargo is in good condition when it was turned over to Central Transport.

How about arriving in Erie, as I've already touched upon. These parties have now come to the conclusion or have now admitted that yes, it was damaged once it arrived here. And then is there damage, were there money damages suffered by Accu-Spec as a result of this incident. Well, you heard Mr. Carlson talk about the various types of money that they had to pay out in order to have the equipment repaired. And we have an exhibit that you're actually going to have available to you in the jury room that outlines each of those categories of damage. And I would suggest to you that they did the reasonable thing. I mean, there's been a huge amount of effort in this case to avoid responsibility. And arguments that have been made, have included the idea that you should have looked somewhere here in the states to get this thing repaired. Well, it's under warranty. You're not going to send it back to anyone but the manufacturer. You're not going to let someone who isn't familiar with the design of this machine tinker with it, tinker with a lead shield that exposes, potentially exposes radiation to the operator. Come on, that's just ridiculous. Yet, it's an argument that's made with a straight face in an effort to avoid responsibility. You'll have this available.

I would submit to you that every nickel, every nickel that Accu-Spec spent was appropriate and reasonable. $47,521.84 as I believe is the number.

So what is the defense. Well, it used to be new versus used. But as Mr. Berlin pointed out, that is kind of a new argument. That's gone. Now it's packaging. The defendants have the burden of establishing for you that somehow the shipper, us, or Dage, we stand in Dage's shoes, the shipper caused the damage. And they have come up with this theory that the packaging is the cause of the damage.

Let me review what the proof is and let's first talk about a little physics. This is two-and-a-half tons of machine. It's made of steel. It's lined with lead. It's walls are thick. I'm going to show you a photograph. This is Exhibit 6 and you'll have it available to you when you deliberate. It's a photograph of the back of the machine. Take a look at it closely when you have an opportunity to deliberate. The walls are essentially the thickness from this line to this line. It's not just sheet metal. It's lined with lead. It's lined with lead. It's a very heavy piece of equipment.

There's been a suggestion that somehow there should be some sort of foam or crating over and under the shelf. This thing doesn't wiggle. It's not jello, it's rigid. Once it is set in the crate and blocked and these gentlemen, as they spoke to you in their closings suggest, well, the blocking is just gone. No, it isn't, there is no evidence that it's gone. Remember, it's their burden to prove we caused the damage. There is no evidence that this blocking was gone. Once it was in the crate and blocked at the bottom, it's not going to wiggle at the top.

Now, there's a suggestion about casters, you didn't really hear anybody talk about casters because that's a new argument, too. That somehow it's rolling around on the inside of this box. It's not. Let's think about the proof. First of all, let's think about the whole packaging theory, when did it come up. You heard Mr. Horetsky testify. Horetsky was the only person from Central Transport to see this crate, physically see this crate. Did he do any kind of a report that suggested after his visit to Accu-Spec that oh, the packaging is bad, the packaging is bad. No such report, no such report. He said in fact that he could barely see inside the crate, he could barely see the machine as it was inside the crate.

Then we have the MTI people. We didn't hear from anyone from MTI. Mr. Horetsky arranged for an outside inspection company to come to Erie and look at this particular

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piece of equipment. I'm not sure what exhibit number it is, it's one page, you'll see on it MTI. It says nothing about packaging. That's within a few weeks of it having arrived in Erie. Says nothing about packaging.

And then there's Mr. Cackowski, who is the claims manager, the gentleman who works for Central Transport. He explained that he actually saw the report from MTI, and he saw photographs of the crate and the equipment. And he writes his report. He writes to Mr. Mullen on April 23, 2003. Does he say anything about packaging. No, not a word. Doesn't say a word about packaging. This whole packaging business is after the fact. It's part of the energy that is being spent simply to avoid responsibility.

Even as late as 2003, the holiday season of 2003, when Mr. Berlin calls the people, I think he said he called a Mr. Rafferty at Central Transport and said hey, you got to pay this, you got to pay this. I said to Mr. Berlin why did you say that to him. Because it was damaged in transit. You people have to pay. And what did Rafferty tell him. Bad packaging, no, no. He said well, I think they're claiming too much, claiming too much. They're claiming $120,000 or something like that. Of course, by that point in time we had already amended our claim to the actual amount of money that we paid out. By that point in time, by the end of September, we had the machine back, maybe it's early October. We had the

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machine back, we knew what our actual damages were, we sent them an amended claim. So all way, at the end of 2005 in the holiday season, they're not saying a word about packing. Who has seen the crate, other than Mr. Horetsky in his short visit to Accu-Spec. Mr. Mullen saw the crate. Mr. Carlson saw the crate. What did they say about it. We opened the panel, it's snug, it doesn't roll around, it's two-and-a-half tons.

What about Mr. Fisher. He has sent a hundred of these things out of his facility in Fremont with that crate design. It's blocked at the bottom, it's not going to move at the top, it's not jello.

Now, perhaps the most important fact I want to emphasize to you is the question of packing. They're saying that packing caused the damage, not mishandling. Perhaps it was Mr. Knox who said you may have one. You have potential mishandling, potential bad packing. Think about this. Take a look, please, when you go back, at Exhibit 15, Plaintiff's Exhibit 15. One of the witnesses, it might have been Mr. Cackowski, might have been Mr. Horetsky, suggested, well, with it bouncing down the road, you know it could be wiggling in there, it could be hitting against the crate. Look at the crush on this steel. That wasn't caused by it banging against the wall of the crate. This is lead and steel. And then think about how thick it is. This thing was jammed. It looked to us like it was dropped.

Remember, I said to you in the opening statement and even I think Mr. Knox mentioned it, we don't have to prove that somebody was negligent. We don't have to prove somebody was careless, we don't have to prove somebody mishandled it. We don't have to prove that something intentionally damaged it. We don't have to prove how it was damaged, if it was dropped. It looked to us like it was dropped. I have no answer for this tip and tell thing. Maybe something, it ran into a wall, I don't know. The point is, as Mr. Berlin acknowledged, it was damaged in transit, they should pay. That is the point. And no rolling around in a crate, no bouncing down a road, is going to cause the crushed damage that you see to that steel and lead wall.

The damage claim here is $47,521.84. It is a reasonable claim. The law is very clear that when goods are damaged in transit, the freight forwarder and the shipper, I'm sorry, the freight forwarder and the motor carrier owe the money. It has taken us two-and-a-half years in getting to this point to ask you for that relief that seems so clear to us.

You've been very, very attentive, I appreciate that. This is a big inconvenience in your life. And on behalf of Accu-Spec, we appreciate all the attention you've given us and it's been my pleasure to work with you. Thank you very much.

THE COURT: Members of the jury, I'm not going to give you my charge right now because it's going to go a little

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bit. It's five after four, then you have to start deliberating, before you start to deliberate, then it's time to send you home. So I'm going to send you home. We anticipated finishing tomorrow anyways. I'm going to ask you to be back here and I'll give you my charge at nine. And then you'll go and you'll deliberate. I'm going to stay on the bench. Did you have something, Mr. Cohen?

MR. COHEN: Your Honor, just one question, would you permit any rebuttal?

THE COURT: No. So I'm going to stay on the bench, you folks just mosey on in there and go home, we'll see you tomorrow. Have a nice night, don't talk about the case.

(Jury dismissed at 4:06 p.m., for the day.)

THE COURT: Stick around here, my law clerk, it occurred to me when I looked at the charge, one of the things that were not included was a explication of the preponderance of the evidence insofar as it relates to both the plaintiff, and once the burden has shifted, few others things -- we'll give you that, as well as the revised verdict form. Why don't you plan on being here at a quarter to nine tomorrow, if there are any additional questions, we can resolve them then.

(Whereupon, at 4:08 p.m., the Jury Trial proceedings were adjourned for the day.)

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C E R T I F I C A T E

I, Ronald J. Bench, certify that the foregoing is a correct transcript from the record of proceedings in the above-entitled matter.

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Ronald J. Bench